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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 394

COMMONWEALTH OF PENNSYLVANIA,
PETITIONER,

vs.

JOHN G. WILLIAMS, JOSEPH B. SIMON, AND CHARLES DENBY, JR., RECEIVERS OF MORTGAGE BUILDING AND LOAN ASSOCIATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 21, 1934.

CERTIORARI GRANTED OCTOBER 22, 1934.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

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IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 7535. December Term, 1932

In Equity

EDWIN B. ELSON

v.

MORTGAGE BUILDING & LOAN ASSOCIATION

Wm. A. Schnader, Attorney General, State of Pennsylvania.
Harold D. Saylor, Deputy, for intervening petitioner.
Wolf, Block, Schorr & Solis-Cohen, for receivers.

DOCKET ENTRIES

Feb. 9, 1933. Bill of Complaint filed.
Feb. 9, 1933. Ex parte affidavit by S. G. Friedman filed.
Feb. 9, 1933. Ex part affidavit by W. Fleisher filed.
Feb. 9, 1933. Motion for appointment of Temporary Receivers filed.
Feb. 9, 1933. Decree appointing John G. Williams and Joseph B. Simon, Temporary Receivers, filed.
Feb. 9, 1933. Bond of Receivers, with Standard Accident Ins. Co., surety, in $25,000, and Decree approving Bond, filed.

[fol. 2]

Feb. 10, 1933. Subpœna returned—service accepted with instructions to enter appearance of Bernheimer & Sundheim, Esqs., for defendant, and filed.
Feb. 10, 1933. Answer filed.
Feb. 10, 1933. Motion for appointment of permanent receivers, filed.
Feb. 10, 1933. Decree appointing John G. Williams and J. B. Simon permanent receivers, filed.

Feb. 10, 1933. Bond of permanent receivers with Standard Accident Insurance Co., surety, in $25,000 and Decree approving same, filed.

Feb. 18, 1933. Printed Copy of bill, answer and Decree appointing Receivers, filed.

Feb. 20, 1933. Petition by Receivers for leave to amend original decree appointing Receivers so as to include Gage Realty Corporation, and Decree granting petition, filed.

Feb. 20, 1933. Answer by Gage Realty Corporation, filed.

Feb. 20, 1933. Petition by Receivers for leave to employ accountants and Decree granting petition, filed.

Feb. 20, 1933. Appearance of Wolf, Block, Schorr & Solis-Cohen, Esqs., for Receivers, filed.

Feb. 20, 1933. Decree appointing Charles Denby, Jr., co-receiver with John G. Williams and J. B. Simon, filed.

[fol. 3]

Feb. 23, 1933. Bond of Charles Denby, Jr., co-receiver with Standard Accident Ins. Co., surety, in $25,000, and Decree approving same, filed.

Feb. 24, 1933. Appearance of Ladner & Ladner, Esqs., for Receivers, filed.

Feb. 28, 1933. Petition for and Decree appointing Appraisers, filed.

Mar. 17, 1933. Petition by Receivers for order on Tradesmens National Bank et al. to show cause why summary order should not be made directing certain bonds in custody of Tradesmens National Bank & Trust Company to be delivered to said Receivers and Order of Court granting Order to show cause, filed.

Mar. 21, 1933. Petition for order on Receivers to show cause why they should not return to A. Schlesinger stock loan notes, etc., and Decree directing Receivers to show cause, filed.

Mar. 23, 1933. Answer of Nice Ball Bearing Company to petition of Receivers for delivery of certain bond, filed.

Mar. 23, 1933. Answer of Tradesmens National Bank & Trust Co. to petition by Receivers, filed.

Mar. 24, 1933. Appearance of Evans, Bayard & Frick, Esqs., for Tradesmens National Bank & Trust Company, filed.

[fol. 4]

Mar. 24, 1933. Argued sur petition by Receivers for order on Tradesmens National Bank et al. for order directing delivery of certain bonds.

Mar. 27, 1933. Petition by Commonwealth of Pennsylvania for rule to show cause why it should not be permitted to intervene, etc., and Order of Court granting rule filed.

Mar. 31, 1933. Order of Court directing Tradesmens National Bank and Trust Company to deliver to Receivers certain bonds, filed.

Mar. 31, 1933. Petition by Provident Trust Company to proceed with foreclosure of mortgage, filed.

Mar. 31, 1933. Answer to petition of Commonwealth of Pennsylvania for leave to intervene and for an Order on Receivers to surrender defendants assets to the Secretary of Banking, filed.

Apr. 6, 1933. Amended Petition of Alfred Schlesinger for Order on Receivers to return petitioner's stock loan notes and Order of Court granting rule to show cause why Receivers should not be restrained from proceeding with any suit upon stock loan notes of Alfred Schlesinger, etc., filed.

Apr. 13, 1933. Petition by A. W. Massrick, as successor Trustee, for leave to institute foreclosure proceedings (Chet Wayne Apartments), filed.

Apr. 13, 1933. Answer by Receivers to petition for leave to institute foreclosure proceedings, filed.

[fol. 5]

Apr. 13, 1933. Decree granting leave to institute foreclosure proceedings (Chet Wayne Apartments), filed (17671—March Term, 1933).

Apr. 13, 1933. Answer to amended petition of Alfred Schlesinger for return of stock, loan notes, filed.

Apr. 18, 1933. Notice of appeal by Nice Ball Bearing Company and invitation to join as parties appellant, Robert J. Sterrett and Fred Taylor Pusey, Ancillary Receivers of Union Indemnity Company, filed.

Apr. 18, 1933. Notice of appeal by Nice Ball Bearing Company and invitation to join as parties appellant, Tradesmens National Bank and Trust Company, filed.

Apr. 18, 1933. Waiver of Tradesmens National Bank & Trust Company filed.

Apr. 18, 1933. Order of Severance and granting leave to file petition for appeal by Nice Ball Bearing Company without joining the other parties hereto in application for appeal, filed.

Apri. 18, 1933. Petition by Nice Ball Bearing Company for appeal, filed.

Apr. 18, 1933. Decree allowing appeal, filed.

Apr. 18, 1933. Bond sur appeal in $250, with New Amsterdam Casualty Company, surety, and Decree approving bond, filed.

Apr. 18, 1933. Assignments of Error, filed.

Apr. 18, 1933. Citation allowed and issued.

[fol. 6]

Apr. 18, 1933. Præcipe for transcript of record sur appeal, filed.

Apr. 18, 1933. Copy of Notice of appeal, filed.

Apr. 19, 1933. Citation returned—service accepted—and filed.

Apr. 25, 1933. Transcript of record transmitted to counsel for appellant.

May 8, 1933. Petition by Receivers for leave to effect certain compromises and Decree granting petition, filed.

May 8, 1933. Argued sur petition of Commonwealth of Penna. for leave to intervene and for order on Receivers to surrender assets to Secretary of Banking.

June 2, 1933. Petition of Southwark Title and Trust Company, Trustee, for order on Receivers to show cause why certain foreclosure proceedings should not be proceeded with

and carried out etc., and Order of Court granting order to show cause, filed.

June 2, 1933. Petition by Penna. Co. for Ins. on Lives, etc., for leave to institute foreclosure proceedings 6632 Malvern Ave., Philadelphia and Decree granting petition, filed.

June 6, 1933. Petition for leave to amend petition of Southwark Title & Trust Co., of June 2, 1922, and Decree allowing petition, filed.

June 7, 1933. Answer to petition of Southwark Title & Trust Co., Trustee, to carry out foreclosure proceedings, filed.

[fol. 7]

June 7, 1933. Petition by Receivers for Decree authorizing them to accept certain settlements, and Decree granting petition, filed.

June 7, 1933. Decree granting leave to Southwark Title & Trust Co., to proceed with certain foreclosure proceedings in C. P. No. 3 (Chestnut Arms Apartment), etc., filed.

June 8, 1933. Petition for payment to Receivers on account of compensation and Decree granting petition, filed.

June 16, 1933. Petition by James McG. Mallie, lessee of certain apartment (Weymouth Hall Apartments), for leave to pay money into court pending determination of party entitled to same, and Decree granting petition, filed.

June 16, 1933. Decree amending Decree of June 7, 1933, filed.

June 16, 1933. Receivers' First Report, filed.

June 16, 1933. Petition by Receivers for leave to enter into agreement with the Philadelphia Savings Fund Society and Decree directing that creditors and stockholders of defendant be notified to appear and show cause why petition should not be granted, filed.

June 16, 1933. Petition by Receivers for leave to compromise certain mortgage claims and Decree directing that creditors and stockholders of defendant be notified to appear and show cause why petition should not be granted, filed.

[fol. 8]

June 17, 1933. Opinion, Welsh, J., dismissing petition of Attorney General of Commonwealth of Penna., for order on Receivers to surrender assets to Secretary of Banking, filed.

June 21, 1933. Report of Appraisers filed.

June 21, 1933. Affidavit as to Mailing Notices filed.

June 23, 1933. Decree dismissing petition of Commonwealth of Pennsylvania for order on Receivers to surrender assets to Secretary of Banking, filed.

June 28, 1933. Appearance of George K. Helbert, Esq., for Appraisers, filed.

June 28, 1933. Petition by Receivers for leave to effect certain compromises and Decree granting same, filed.

June 28, 1933. Assignments of Error filed.

June 28, 1933. Petition by Receivers for leave to invest funds in U. S. Treasury Certificates and Decree granting petition, filed.

June 28, 1933. Decree granting leave to accept $48,000, in cash in full payment of mortgage held on No. Wheatland Street, Phœnixville, Pa., filed.

June 29, 1933. Petition by Commonwealth of Pennsylvania for appeal and Decree granting appeal, filed.

June 29, 1933. Præcipe for transcript of record sur appeal, filed.

June 29, 1933. Citation allowed and issued.

[fol. 9]

June 29, 1933. Decree granting leave to enter into agreement with Philadelphia Savings Fund Society, filed.

June 30, 1933. Petition of John Hancock Mutual Life Ins. Co. for leave to prosecute foreclosure of mortgage, filed.

July 3, 1933. Answer of Receivers to petition of June 30, 1933, filed.

July 3, 1933. Decree granting leave to John Hancock Mutual Life Ins. Co. to carry out foreclosure proceedings, filed.

July 3, 1933. Citation by Commonwealth of Pennsylvania, intervening petitioners, returned "Service accepted," and filed.

July 6, 1933. Copy of notice of appeal by Commonwealth of Pennsylvania, filed.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT—Filed February 9, 1933

To the Honorable the Judges of the said Court:

Edwin B. Elson, plaintiff, files this bill on behalf of himself and all other creditors or stockholders or claimants against defendant who shall join as parties plaintiff herein, and complaining says that:

1. He is a citizen of the State of New York, residing at New York City.

2. Mortgage Building and Loan Association, hereinafter referred to for brevity as "defendant," is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and engaged in the city and county of Philadelphia in the conduct of the business of a building and loan association, having been formed [fol. 11] on the seventh day of April, 1931, by the merger and consolidation of Shareholders Building and Loan Association, Handel & Hayden Building and Loan Association, Academy Building and Loan Association, Hoover Building and Loan Association, The Realty Building and Loan Association, Gerson-Dannenberg Building and Loan Association and Mortgage Building and Loan Association (hereinafter referred to as old Mortgage Building and Loan Association), which were respectively corporations organized and then existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and engaged in the city of Philadelphia in the conduct of the business of building and loan associations.

3. The amount in controversy in this matter exceeds the sum of $3,000, exclusive of interest and costs.

4. Plaintiff was a member of old Mortgage Building and Loan Association, one of the parties to the aforesaid

merger and consolidation, and was the owner of shares of stock therein on which there was paid in a total sum of $31,200 as follows:

(a) Book No. D-3308 for 100 shares in the thirty-third double series, on which there was paid in the sum of $8,400;

(b) Book No. D-3332 for 100 shares in the thirty-third double series, on which there was paid in the sum of $8,400; and

(c) Book No. D-3506 for 200 shares in the thirty-fifth double series, on which there was paid in the sum of $14,400.

5. Thereafter on or about the twenty-eighth day of March, 1931, plaintiff delivered to defendant written notice of the withdrawal and cancellation of the aforesaid [fol. 12] shares, which notice was duly received by old Mortgage Building and Loan Association on or about the twenty-ninth day of March, 1931, and placed upon its withdrawal list.

6. On the thirty-first day of March, 1931, a special meeting of the stockholders of old Mortgage Building and Loan Association was held for the purpose of voting upon the agreement of merger and consolidation with the building and loan associations hereinabove referred to, at which meeting plaintiff was present in person and expressly cast his vote against the proposed merger.

7. In the agreement for the aforesaid merger and consolidation, old Mortgage Building and Loan Association valued and appraised plaintiff's shares of stock, on which dues totalling $31,200 were paid in, as having a fair, real and actual value of $24,089.60 as of the seventh day of April, 1931, the date of the merger.

8. At the time of the aforesaid meeting of stockholders of old Mortgage Building and Loan Association there were issued and outstanding shares of stock thereof, on which there had been paid in as dues the total sum of approximately $1,300,000, of which approximately 61.2 per cent, or stock having a paid-in value of approximately $795,600, was voted in favor of the merger, and approximately 2.8 per cent, or stock having a paid-in value of approximately $36,400, including all the stock of plaintiff, was expressly

voted against the merger; and the remaining shares of stock of old Mortgage Building and Loan Association, on which dues were paid in in the amount of approximately $468,000, were not voted either for or against the merger.

[fol. 13] 9. Immediately prior to the aforesaid merger and consolidation there were issued and outstanding among all of the building and loan associations which were parties thereto, shares of stock on which there had been paid in as dues the sum of approximately $3,426,274, of which approximately 61.2 per cent, or stock having a paid-in value of approximately $2,096,879.65, was voted in favor of the merger, and approximately 2.8 per cent, or stock having a paid-in value of $95,935.66, including all the stock of plaintiff, was expressly voted against the merger; and the remaining shares of stock of the Mortgage Building and Loan Association, on which dues were paid in in the amount of approximately $1,233,458.69 were not voted either for or against the merger.

10. Defendant is presently indebted to its banks for borrowed money to the extent of approximately $350,000 and is indebted to other preferred creditors on claims arising other than from the ownership of stock in the amount of approximately $50,000 or a total of approximately $400,000.

11. Defendant association is now and has been for a long time insolvent and the real, actual and fair value of its assets is far less than its liability to stockholders on dues paid in together with its general indebtedness, and at the present time its capital of approximately $2,379,840.60 is actually impaired to the extent of approximately 40 per cent, or approximately $951,936.24.

12. During the past year or more defendant has sustained losses of approximately $500,000 on its mortgaged loans of approximately $2,950,000; during said time defendant has been operating and carrying the real estate which [fol. 14] it was compelled to buy in on foreclosure of many of its mortgages at a great loss; and during said period defendant has abandoned a large amount and proportion of its assets.

13. By reason of its present insolvent condition which has existed for the past year and more, defendant has abandoned entirely the active conduct of its business; for

more than two and one-half years has made no mortgage loans; has practically ceased making stock loans; for more than two and one-half years has made no payments of withdrawals although it now has a withdrawal list in excess of $200,000, and the payments of dues, interest and premiums on its outstanding mortgage loans in the face amount of approximately $2,950,000 are in arrears to the extent of approximately $220,000.

14. As a result of its existing insolvency, defendant on or about the eighth day of December, 1932, abandoned the collection of further dues on free shares and since that time has refused to receive dues from free shareholders so that its income since has consisted exclusively of rents and payments received from borrowers on their loans.

15. Although plaintiff expressly voted against the aforesaid merger and consolidation and thereby signified his disapproval thereof, and although he had previously tendered to old Mortgage Building and Loan Association due and proper written notice of the withdrawal and cancellation of all of his shares of stock, defendant has failed to pay to plaintiff either the whole or any part of his claim.

16. By reason of the aforesaid merger and of the existence of approximately $200,000 in withdrawals still unpaid, of its large outstanding indebtedness for borrowed money [fol. 15] and preferred claims of outside creditors in the amount of approximately $400,000, and the claims of shareholders who did not expressly vote in favor of the aforesaid merger and consolidation who held shares having a paid-in value of approximately $1,329,394.35, defendant has been and is subject to seizure of its assets by many of its creditors or stockholders, as the result of which the assets of defendant may be dissipated and its assets subjected to forced sales and thereby destroyed as assets of defendant.

17. That on or about the seventh day of May, 1932, Nice Ball Bearing Company, a corporation, a stockholder of defendant which did not expressly assent to the aforesaid merger and consolidation, obtained judgment against defendant in the amount of $40,044, as the fair, real and actual value of its stock in the Court of Common Pleas No. 2 of Philadelphia County as of September Term, 1931, No. 9565, which judgment was affirmed by the Supreme Court of Pennsylvania on the sixteenth day of January, 1933.

Nice Ball Bearing Company, since the entry of said judgment and the affirmance thereof by the Supreme Court of Pennsylvania, has threatened to issue executions against defendant and to levy upon and seize the assets of defendant for the collection of said judgment, and other claimants have already instituted and still others threaten to institute suits against defendant for payments of their claims.

18. Unless defendant's assets are conserved and its affairs managed and conducted free of preferences, plaintiff and other claimants against the assets of defendant, creditors as well as stockholders, will be without means of securing payment of their claims or of participating equally in the assets of defendant along with other claimants or stockholders equal in class or priority.

[fol. 16] 19. By reason of the foregoing, in the interest of plaintiff as well as of others having the same rights against defendant, and of all its members and creditors, and to prevent immediate and irreparable loss or damage, defendant's affairs should be liquidated and its assets distributed under the equitable and impartial supervision of a court of competent jurisdiction.

20. Wherefore plaintiff, being in need of equitable relief and having no adequate remedy at law and having relief only in equity, files this bill of complaint on behalf of himself and all parties in interest who may come in and contribute to the expense of this action, and plaintiff prays your honorable Court:

(a) That a receiver or receivers be forthwith appointed to take charge of and manage the property and assets of Mortgage Building and Loan Association, a corporation, the defendant, of every nature and wheresoever the same may be situate and in whosesoever hands the same may be;

(b) That said receiver or receivers be authorized and empowered to demand, sue for, collect, receive and take into their possession all the goods, chattels, rights, credits, moneys, effects, lands, tenements, choses in action, books, papers and records and all other property, real and personal of whatsoever kind, character or description and wheresoever situate of Mortgage Building and Loan Association, the defendant, and to institute, prosecute, inter-

vene in, become party to, defend or compromise suits at law or in equity for the protection, recovery or maintenance of any of the property and assets, rights, damages or demands of or belonging to the defendant including also the power to continue in such pending suits or actions; and in- [fol. 17] cluding also the institution and prosecution of such ancillary proceedings, all as said receiver or receivers may deem necessary or proper, and to settle and compound or make allowance on any and all debts now due or owing to the defendant as said receiver or receivers may deem advisable or proper;

(c) That each and every the officers, directors, agents, employees and servants of defendant and all other persons be required and commanded forthwith upon demand of said receiver or receivers to deliver up to him or them all and every part of the property and assets of defendant wheresoever situate including also all books, records and documents of, concerning or in any way relating to the defendant or its business;

(d) That your Honorable Court marshal the assets of defendant and ascertain the respective liens and priorities existing against the property of defendant and the rights, liens and equities of its creditors, stockholders or other claimants;

(e) That the directors, officers and agents of defendant, its creditors, stockholders and claimants and all other persons be enjoined and restrained from selling, transferring, assigning or disposing of or in any manner interfering with any of the property of defendant, or interfering with the said receiver or receivers in the performance of his or their duty, and that they or any of them deliver up, transfer, convey and assign to said receiver or receivers all or any of the property or property rights of defendant;

(f) That the directors, officers and agents of defendant, its creditors, stockholders and claimants and all other persons be enjoined and restrained from levying, executing [fol. 18] upon, attaching, intermeddling with or taking possession of all or any of the property of defendant and from taking or attempting to take into their possession any one of the property of defendant or in any wise interfering or intermeddling therewith;

(g) That said receiver or receivers proceed forthwith with the care and management of the property and assets of defendant and liquidate the business and property and assets of defendant in such manner as they may deem necessary or proper;

(h) That your Honorable Court grant such other and further relief and such other and further powers to said receiver or receivers as the exigencies of the case may require and as to your Honorable Court may seem proper;

And he will ever pray, etc.

(Sgd.) Edwin B. Elson. Wolf, Block, Schorr & Solis-Cohen, by (Sgd.) Gordon A. Block, Solicitors for Plaintiff.

[fol. 19] *Duly sworn to by Edwin B. Elson. Jurat omitted in printing.*

[fol. 20] IN UNITED STATES DISTRICT COURT

DECREE APPOINTING TEMPORARY RECEIVERS—Filed February 9, 1933

And now, to wit: this ninth day of February, A. D. 1933, this cause having come on for hearing, sur: motion for the appointment of temporary receivers, and notice of said application having been given to the attorney for the Mortgage Building and Loan Association, and Joseph H. Sundheim, Esq., appearing and not objecting to said appointment of temporary receivers, it is hereby ordered, adjudged and decreed as follows:

1. That John G. Williams and Joseph B. Simon be and they thereby appointed temporary receivers of the abovenamed defendant, Mortgage Building and Loan Association, a corporation, and of all its property and assets of every nature and wheresoever the same may be situate and in whosoever hands the same may be, and to proceed forthwith with the care and management of the property and assets of defendant and to liquidate the business and property and assets of defendant in such manner as they may deem necessary or proper, and for so doing to employ such persons and make such payments and dibursements as may be needful and proper, and said temporary receivers

may upon application to and authority from this Court borrow such sums of money as in their judgment may be needful in order to preserve and protect the aforesaid property and assets of defendant, and to keep the same in proper condition or repair.

2. That said temporary receivers be and they hereby are authorized and empowered to demand, sue for, collect, [fol. 21] receive and take into their possession all the goods, chattels, rights, credits, moneys, effects, lands, tenements, choses in action, books, papers and records and all other property, real and personal of whatsoever kind, character or description and wheresoever situated of Mortgage Building and Loan Association, the defendant, and to institute, prosecute, intervene in, become party to, defend or compromise suits at law or in equity for the protection, recovery or maintenance of any of the property and assets, rights, damages or demands of or belonging to the defendant including also the power to continue in such pending suits or actions; and including also the institution and prosecution of such ancillary proceedings, all as said temporary receivers may deem necessary or proper, and to settle and compound or make allowance on any and all debts now due or owing to the defendant as said temporary receivers may deem advisable or proper;

3. The defendant, Mortgage Building and Loan Association, its officers, directors, agents, employees and servants and all other persons be and the same are hereby required and commanded forthwith upon demand of said temporary receivers to deliver up to them all and every part of the property and assets of defendant wheresoever situate including also its books, records and documents of, concerning or in any way relating to the defendant or its business;

4. That defendant, Mortgage Building and Loan Association, its directors, officers and agents, its creditors, stockholders and claimants and all other persons be and they hereby are enjoined and restrained from selling, transferring, assigning or disposing of or in any manner interfering with any of the property of defendant or interfering with the said temporary receivers in the performance of [fol. 22] their duty and all or any of such persons are hereby ordered and required to deliver up, transfer, convey and assign to said temporary receivers all or any of the property or property rights of defendant.

5. That defendant, Mortgage Building and Loan Association, its directors, officers and agents, its creditors, stockholders and claimants and all other persons be and they hereby are enjoined and restrained from commencing, prosecuting or continuing to prosecute any action at law or in equity or otherwise against defendant or against said temporary receivers, or foreclosing upon, selling or in any wise disposing of any property of defendant or on which defendant holds any lien or encumbrance, without leave of this Court or the approval of said temporary receivers first had and obtained; and said persons be and they hereby are enjoined and restrained from levying, executing upon, attaching, intermeddling with or taking possession of all or any of the property of defendant and from taking or attempting to take into their possession any of the property of defendant or in any wise interfering or intermeddling therewith.

6. Security to be entered by said receivers in the amount of $25,000.

7. That the hearing on the application for the appointment of permanent receivers be fixed for February 17, 1933, at 10 A. M.

8. It is further ordered, adjudged and decreed that any monies coming into the hands of the said temporary receivers shall be deposited in a designated depository approved by this Court.

(Sgd.) Welsh, J.

[fol. 23] IN UNITED STATES DISTRICT COURT

ANSWER—Filed February 10, 1930

The defendant, Mortgage Building and Loan Association, answering the bill of complaint filed in the above cause, says:

Defendant in accordance with the resolution set forth in Exhibit "A" hereto attached and made part hereof, admits that the allegations set forth in the bill of complaint are true, except that the board of directors had no knowledge of insolvency until December 8, 1932, if such insolvency existed in fact. Defendant joins in the prayer to your

Honorable Court for the appointment of a receiver or receivers, and further submits itself to such orders and decrees as your Honorable Court may deem proper.

Mortgage Building and Loan Association, By Millard Merz, President. (Corporate Seal.)

[fol. 24] *Duly sworn to by Millard Merz. Jurat omitted in printing.*

[fol. 25] EXHIBIT "A" TO ANSWER

Copy of Resolution of the Board of Directors of Mortgage Building and Loan Association Adopted at a Meeting Duly Called, a Quorum Being Present, Held at the Office of the Corporation at 250 South Broad Street, Philadelphia, Pennsylvania, on the Ninth Day of February, 1933, at 7:45 O'clock P. M.

Resolved that the President of this Corporation be and he is hereby authorized to execute, verify and file an answer admitting the facts set forth in the bill of complaint filed by Edwin B. Elson in the District Court of United States for the Eastern District of Pennsylvania and consenting to the relief prayed for in said Bill of Complaint except that the board of directors had no knowledge of insolvency until December 8, 1932, if such insolvency existed in fact, and further authorizes Bernheimer and Sundheim, Esqs., to enter their appearance as solicitors for the Corporation.

I do hereby certify that the foregoing is a true and correct copy of the Resolution as passed.

(Sgd.) Millard Merz, President. (Corporate Seal.)

[fol. 26] IN UNITED STATES DISTRICT COURT

DECREE APPOINTING PERMANENT RECEIVERS—Filed February 10, 1933

And now, to wit, this tenth day of February, 1933, this cause having come on for hearing sur motion for the appointment of permanent receivers on bill and answer, it is hereby ordered, adjudged and decreed as follows:

1. That John G. Williams and Joseph B. Simon, be and they hereby are appointed permanent receivers of the above-named defendant, Mortgage Building and Loan Association, a corporation, and of all its property and assets of every nature and wheresoever the same may be situate and in whosoever hands the same may be, and to proceed forthwith with the care and management of the property and assets of defendant and to liquidate the business and property and assets of defendant in such manner as they may deem necessary or proper, and for so doing to employ such persons and make such payments and disbursements as may be needful and proper, and said permanent receivers may upon application to and authority from this Court borrow such sums of money as in their judgment may be needful in order to preserve and protect the aforesaid property and assets of defendant, and to keep the same in proper condition or repair.

2. That said permanent receivers be and they hereby are authorized and empowered to demand, sue for, collect, receive and take into their possession all the goods, chattels, rights, credits, moneys, effects, lands, tenements, choses in action, books, papers and records and all other property, [fol. 27] real and personal of whatsoever kind, character or description and wheresoever situate of Mortgage Building and Loan Association, the defendant, and to institute, prosecute, intervene in, become party to, defend or compromise suits at law or in equity for the protection, recovery or maintenance of any of the property and assets, rights, damages or demands of or belonging to the defendant including also the power to continue in such pending suits or actions; and including also the institution and prosecution of such ancillary proceedings, all as said permanent receivers may deem necessary or proper, and to settle and compound or make allowance on any and all debts now due or owing to the defendant as said permanent receivers may deem advisable or proper;

3. The defendant, Mortgage Building and Loan Association, its officers, directors, agents, employees and servants and all other persons be and the same are hereby required and commanded forthwith upon demand of said permanent receivers to deliver up to them all and every part of the

property and assets of defendant wheresoever situate including also its books, records and documents of, concerning or in any way relating to the defendant or its business;

4. That defendant, Mortgage Building and Loan Association, its directors, officers and agents, its creditors, stockholders and claimants and all other persons be and they hereby are enjoined and restrained from selling, transferring, assigning or disposing of or in any manner interfering with any of the property of defendant or interfering with the said permanent receivers in the performance of their duty and all or any of such persons are hereby ordered and required to deliver up, transfer, convey and assign to said permanent receivers all or any of the property [fol. 28] or property rights of defendant.

5. That defendant, Mortgage Building and Loan Association, its directors, officers and agents, its creditors, stockholders and claimants and all other persons be and they hereby are enjoined and restrained from commencing, prosecuting or continuing to prosecute any action at law or in equity or otherwise against defendant or against said permanent receivers, or foreclosing upon, selling or in any wise disposing of any property of defendant or on which defendant holds any lien or encumbrance, without leave of this Court or the approval of said permanent receivers first had and obtained; and said persons be and they hereby are enjoined and restrained from levying, executing upon, attaching, intermeddling with or taking possession of all or any of the property of defendant and from taking or attempting to take into their possession any of the property of defendant or in any wise interfering or intermeddling therewith.

6. Security to be entered by said receivers in the amount of $25,000.

7. It is further ordered, adjudged and decreed that any monies coming into the hands of the said permanent receivers shall be deposited in a designated depository approved by this Court.

(Sgd.) Welsh, J.

[fol. 29] IN UNITED STATES DISTRICT COURT

DECREE APPOINTING CO-RECEIVER

And now, to wit, February 20, 1933, it is ordered, adjudged and decreed that Charles Denby, Jr., Esq., be and he hereby is appointed co-receiver of the defendant, Mortgage Building & Loan Association, and to act as co-receiver, with John G. Williams and J. B. Simon, duly appointed permanent receivers on February 10, 1933, and he is to perform the duties of co-receiver in conformity with the decree of this Court in the above matter, made on the tenth day of February, 1933, and it is

Further ordered that the said co-receiver shall enter a joint bond in the sum of twenty-five thousand dollars.

(Sgd.) Welsh, J.

[fol. 30] IN UNITED STATES DISTRICT COURT

DECREE INCLUDING GAGE REALTY CORPORATION

And now, to wit, this twentieth day of February, A. D. 1933, upon consideration of the foregoing petition, and upon motion of counsel for the petitioners, it is ordered, adjudged and decreed that the decree entered on the tenth day of February, 1933, in the within entitled matter be amended, so as to read as follows:

It is further ordered and decreed that the said receivers be and they hereby are authorized and empowered to take into their possession all of the properties, assets and effects of the Gage Realty Corporation, which is a subsidiary and/or affiliate of Mortgage Building and Loan Association, and which, in fact, constitutes part of its assets, with the same rights and powers as are set forth in the original decree.

By the Court.

Welsh, J.

[fol. 31] IN UNITED STATES DISTRICT COURT

PETITION OF THE COMMONWEALTH OF PENNSYLVANIA FOR LEAVE TO INTERVENE AND FOR AN ORDER ON RECEIVERS TO SURRENDER DEFENDANT'S ASSETS TO THE SECRETARY OF BANKING—Filed March 27, 1933

To the Honorable, the Judges of said Court:

The Commonwealth of Pennsylvania by William A. Schnader, its Attorney General, files its petition asking leave to intervene in this proceeding, instituted by bill in equity, and seeking an order on the defendant's receivers appointed by your Honorable Court to deliver over defendant's assets to the Secretary of *of* Banking of the Commonwealth.

1. William D. Gordon is Secretary of Banking of the Commonwealth of Pennsylvania, having been duly appointed to said office by Gifford Pinchot, Governor of the Commonwealth, by and with the consent of the Senate thereof.

2. Mortgage Building and Loan Association, defendant, hereinafter referred to as such, is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, having been created by charter granted by the Governor on April 7, 1931. Since that date defendant has transacted business as a building and loan association under the protection of the Commonwealth and subject to the supervision of its Department of Banking, pursuant to the provisions of the Banking Act 1923, being the Act of June 15, 1923, P. L. 809, of the General Assembly of Pennsylvania, as amended and supplemented.

[fol. 32] 3. On February 9, 1933, your Honorable Court, upon application of Edwin B. Elson, a citizen of the State of New York, appointed John G. Williams and Joseph B. Simon temporary receivers for defendant, which appointment was made permanent on February 10, 1933. Subsequently, on February 28, 1933, your Honorable Court appointed Charles Denby, Jr., a co-receiver for defendant.

4. Defendant was incorporated on April 7, 1931, by the merger of seven building and loan associations of the Commonwealth of Pennsylvania, all theretofore existing as cor-

porations and doing business in the City of Philadelphia under and by virtue of the laws of the Commonwealth of Pennsylvania and subject to the supervision and control of the Department of Banking. At all times during the life of said corporations they were actively supervised by the Secretary of Banking, as was at all times their successor, defendant herein, following its incorporation.

5. After defendant was incorporated on April 7, 1931, the Secretary of Banking of the Commonwealth of Pennsylvania pursuant to law caused an examination to be made of defendant's affairs and as a result thereof, summoned defendant's officers and directors to appear before him on Friday, June 5, 1931, at the offices of the Department of Banking in the City of Philadelphia. At that time and place defendant's officers and directors being present, a hearing was held before the Attorney General and the duly authorized representative of the Department of Banking concerning the affairs of defendant, which was then and there found to be in an unsafe and unsound condition. As a result thereof the said officers and directors were instructed by the Secretary of Banking to follow a definite course of action to safeguard the interests of defendant's creditors and shareholders.

[fol. 33] 6. Thereafter by letter dated June 5, 1931, and transmitted to Millard Merz, president of defendant association, the Secretary of Banking formally placed defendant's activities on a rigidly restricted basis. A copy of said letter, marked "Exhibit A," is hereto attached and hereby made a part hereof.

7. By the terms of said letter received by defendant it was permitted to operate as a building and loan association subject to drastic restrictions imposed by the Secretary of Banking by virtue of his supervision over it and his authority to impose terms for the conduct of its affairs given him by the laws of the Commonwealth.

8. Defendant in recognition of its existing financial condition and of the necessity of complying with the terms imposed upon it by the Secretary of Banking, obeyed said instructions and continued to operate as an association subject to such terms and conditions.

9. Thereafter from time to time defendant's officers and directors communicated with the representatives of the Secretary of Banking with respect to defendant's activities and the conduct of its affairs in compliance with the instructions imposed by him.

10. On or about October 28, 1932, the Secretary of Banking instructed defendant to prepare and submit to him a statement of its condition. In compliance therewith defendant on or about December 6, 1932, through its officers and directors submitted such report to the Secretary of Banking setting forth its financial condition and establishing the fact that it was insolvent. A copy of said report, addressed to defendant's finance committee, and marked "Exhibit B," is hereto attached and made a part hereof.

[fol. 34] 11. At the time said report was submitted a further conference of defendant's officers and directors was held with representatives of the Department of Banking, at which conference it was definitely established and admitted by the said officers and directors that defendant was insolvent.

12. As a result of such conference and of defendant's insolvency its officers and directors were instructed by the Department of Banking that they should:

1. Accept no more dues on account of shares of stock.

2. Return segregated dues to stockholders immediately.

3. Credit payments by the borrowers on account of the principal of the obligations, after deducting legal interest.

4. Pay withdrawals pro rata to all stockholders after payment of preferred claims.

13. By virtue of defendant's insolvency and of the further rigid restrictions placed upon its activities by the Secretary of Banking, there resulted a slow liquidation of defendant's affairs under the supervision of the Department of Banking in order that its assets might be advantageously conserved and the interests of its creditors and shareholders safeguarded.

14. Continuously throughout the period of time intervening between that time and the events hereinafter related defendant continued its corporate existence and its officers

and directors managed its affairs under the instructions and control of the Department of Banking.

[fol. 35] 15. At 5 o'clock P. M., on Wednesday, February 8, 1933, Messrs. John G. Williams, defendant's real estate officer or advisor, Joseph H. Sundheim, its solicitor, and Alfred B. Post, its secretary, called upon the Department of Banking at Harrisburg and interviewed H. H. Eshbach, chief of the Building and Loan Bureau thereof. They informed the Department of Banking that certain lawyers representing creditors or stockholders were making plans to place defendant in receivership. The officers declared that it would be impossible for defendant to continue to function, that liquidation was unavoidable, and that it was necessary for the protection of the interests of creditors and stockholders that the Department of Banking take possession. The Department of Banking, through its agent or officer, H. H. Eshbach, notified defendant's officers that it would act as promptly as possible under the circumstances after consulting the Attorney General, but that it could not assure them, in the event it took possession of defendant, that any of such officers would be appointed receiver or special deputy to act for the Secretary of Banking. Defendant's officers were unable to secure any assurances from the Department of Banking that in the event a State or Federal receivership resulted and was in turn followed by the Secretary of Banking taking possession, there would be consideration given to any of defendant's officers or representatives for continued connection with defendant's affairs as special deputy, counsel, or employee of the Secretary of Banking.

16. Thereafter the following day, Thursday, February 9, 1933, without any notice to your petitioner, to the Department of Banking, to the Secretary of Banking or any of his assistants or representatives, or to defendant's creditors and stockholders, the complainant in these proceedings filed his bill in equity with your Honorable Court, [fol. 36 asking for the appointment of temporary receivers for defendant.

17. Thereupon his Honor, Judge George A. Welsh, without notice of any kind to your petitioner, to the Department of Banking, the Secretary of Banking or to any other individual or individuals connected therewith, in chambers

appointed John G. Williams and Joseph B. Simon temporary receivers for defendant. Said John G. Williams is defendant's real estate advisor or officer who interviewed the Department of Banking at Harrisburg the day before. The first knowledge of such appointment was received by your petitioner's officers through the Philadelphia newspapers published the following morning.

18. On the following day, Friday, February 10, 1933, H. H. Eshbach, chief of the Building and Loan Bureau of the Department of Banking, and Harold D. Saylor, Deputy Attorney General of the Commonwealth of Pennsylvania, called upon his Honor, Judge Welsh, in chambers. In the name of the Commonwealth of Pennsylvania, the Department of Banking and the Department of Justice, said Eshbach and Saylor requested his Honor, Judge Welsh, not to make permanent the appointment of receivers for defendant, but on the contrary, to discharge the temporary receivers. They stated as the reasons for their request the fact that the laws of the Commonwealth of Pennsylvania fully provide for the supervision over and the conduct of the affairs of all building and loan associations, as well as banks, trust companies and other banking institutions of the Commonwealth and provide a system for the liquidation of the affairs of such institutions when they become insolvent or in an unsafe and unsound condition. They stated that the Secretary of Banking in exercising [fol. 37] the jurisdiction over the defendant given him by law had issued orders directing the defendant to safeguard the interests of its creditors and stockholders to the prejudice or preference of no creditor or stockholder or group thereof over any other creditor or stockholder. They further stated thta it would be to the best interests of defendant's stockholders and creditors if its affairs were liquidated by the Secretary of Banking, as such liquidation could be conducted at much less expense than any liquidation by private individuals appointed as receivers by any court. Nevertheless, his Honor, Judge Welsh, thereupon by decree made permanent the appointment of said receivers. Defendant's officers had meantime filed a consent answer admitting insolvency. No service of notice of any kind concerning this proceeding or any phase thereof had been made on creditors or stockholders of the defendant.

19. Thereafter on February 14, 1933, in accordance with the law of Pennsylvania the Secretary of Banking summoned defendant's officers and directors and John G. Williams and Joseph B. Simon, receivers appointed by your Honorable Court, to a hearing to be held on Friday, February 17, 1933, at the Philadelphia office of the Secretary of Banking to show cause why possession should not be taken of defendant's business and property because it was insolvent, in an unsafe and unsound condition to continue business, and in the hands of receivers.

20. At the hearing held at the said time and place defendant's officers and directors attended, but the receivers did not attend, having taken the position that they were under the jurisdiction of your Honorable Court and that it was not incumbent upon them to respond to the summons.

[fol. 38] 21. At the said hearing it was again established that defendant was insolvent, in an unsafe and unsound condition, and in the hands of receivers. Accordingly, the Attorney General of the Commonwealth of Pennsylvania gave his approval and consent to the Secretary of Banking for taking possession of the business and property of defendant.

22. Thereafter, on February 17, 1933, the Secretary of Banking, pursuant to the law of Pennsylvania, filed a formal certificate in his office at Harrisburg taking possession of the business and property of defendant, and at once filed a certified copy thereof in the office of the Prothonotary of Philadelphia County, Pennsylvania, in which county defendant's place of business is located. Said copy was entered in the Court of Common Pleas No. 5 as of December Term, 1932, No. 12603. By the terms of said certificate Richard F. Ennis, of Philadelphia, was appointed special deputy as agent to assist the Secretary of Banking in taking charge of defendant's business and property.

23. On March 1, 1933, the Secretary of Banking made formal demand upon John G. Williams, Joseph B. Simon and Charles Denby, Jr., to deliver over to him as their successor all the books, papers, assets, records and all other property and effects of defendant, in accordance with law. Said demand was made by letter sent by registered mail

to each of the three receivers and received by each of them. A copy of said letter, marked "Exhibit C," is hereto attached and hereby made a part hereof.

24. The Secretary of Banking's demand upon the receivers was made by virtue of the provisions of the Act of Assembly of the Commonwealth of Pennsylvania, approved June 15, 1923, as amended, Section 21 of which provides inter alia as follows:

[fol. 39] "Power of Secretary to Take Possession.—The secretary may, after hearing had upon notice given, with the approval and consent of the Attorney General, take possession of the business and property of any corporation or person subject to the supervision of the department, whenever it shall appear to him that such corporation or person:

* * * * * * *

"IX. Is in the hands of a reeeiver appointed by any court, or in any bankruptcy proceeding, or of an assignee or trustee for creditors appointed by such corporation or person."

and Section 22 of which provides as follows:

"Certificate of Taking Possession.—When the Secretary shall have duly taken possession of the business and property of a corporation or persons as provided in section twenty-one of this act, he shall forthwith make, under his hand and official seal, a certificate setting forth that he has so taken possession, and shall file such certificate in his office, and cause a certified copy thereof to be filed in the office of the prothonotary, * * *

"From and after the filing of such certified copy in the office of the prothonotary, the secretary shall supersede any receiver previously appointed by any court for, or any assignee or trustee for creditors appointed by, such corporation or person."

25. As representing said receivers, their counsel by letter dated March 4, 1933, notified Richard F. Ennis as agent for the Secretary of Banking that they refused to comply with his demand. A copy of said letter, marked "Exhibit D," is hereto attached and hereby made a part hereof.

26. By virtue of the provisions of the Act of Assembly of the Commonwealth approved June 15, 1923, as amended [fol. 40] and supplemented, the Secretary of Banking has superseded any receiver or receivers previously appointed by any court and is entitled to full control of the moneys, securities, assets and property of defendant.

27. The Commonwealth of Pennsylvania avers that the litigation resulting in the appointment by your Honorable Court of the receivers aforesaid is not ordinary litigation in which defendant as a party is involved, but is such as can be instituted oniy by the Attorney General of the Commonwealth, acting on its behalf and in the interest of defendant's creditors and stockholders and the public.

28. The Commonwealth of Pennsylvania has by enactment of its General Assembly subjected defendant and similar institutions to the supervision and administrative control of the Secretary of Banking and has ordained the proceedings, partly administrative and partly judicial, by which the life of such institutions may be determined and their affairs wound up and liquidated.

29. The Commonwealth of Pennsylvania avers that the administration of the affairs of a building and loan association or any other institution under the supervision of the Secretary of Banking, which is insolvent or in an unsafe and unsound condition, by any person or persons other than the Secretary of Banking would be contrary to the policy of the Commonwealth of Pennsylvania as established by its legislative enactments referred to.

30. The Commonwealth of Pennsylvania avers that the sole custody of the affairs of defendant is now in one of its courts, the Court of Common Pleas No. 5 of Philadel- [fol. 41] phia County, that the Secretary of Banking and all parties having any claims against or dealings with defendant are subject only to the jurisdiction of said court, and that the Secretary of Banking alone is entitled to administer the business and affairs of defendant under the control of a court of the Commonwealth of Pennsylvania as provided by the laws thereof.

Wherefore, the Commonwealth of Pennsylvania respectfully prays your Honorable Court to issue a rule to showcause why it should not be granted leave to intervene and

why the Court should not enter a decree directing its appointees, John G. Wiliams, Joseph F. Simon and Charles Denby, Jr., to account to your Honorable Court for such administration of defendant's affairs as they have conducted, and thereafter to deliver over promptly to William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, all assets and records of defendant.

And it will ever pray.

Commonwealth of Pennsylvania, by (Sgd.) Wm. A. Schnader, Attorney General.

[fol. 42] *Duly sworn to by H. H. Eshbach. Jurat omitted in printing.*

EXHIBIT "A" TO PETITION

June 5, 1931.

Mr. Millard Merz, President, Mortgage Building and Loan Ass'n, 1337 Chestnut Street, Philadelphia, Penna.

DEAR SIR:

At a hearing of the Officers and Directors of the above named association, held in the Philadelphia office of the Department of Banking today, and because of the fact that in our opinion the association is in an unsafe and unsound condition, we gave certain instructions as to how the association is to be operated in the future, which instructions we [fol. 43] feel if strictly adhered to will be for the best interest of the stockholders and may work out its salvation.

The instructions are as follows:

First. All payments made by holders of free shares, since the merger, are to be segregated and the funds deposited in a separate bank to which the association is not indebted. All funds remaining in the treasury of the association, after the payment of current expenses are to be applied towards the reduction of your borrowed money account.

Second. Your recent merger provided that no withdrawals for a period of time are to be made. Therefore, it will not be necessary for us to instruct you to do this.

Third. You are to grant no mortgage loans until your association is again examined by this Department.

Fourth. You are to grant stock loans only at the discretion of the Board of Directors where the circumstances so warrant and then only up to 50% of the amount paid in.

Fifth. You will make a determined effort to dispose of your real estate to shareholders for stock.

Before entering into any such sales, however, it will be necessary for you to give notice to all your free shareholders of the terms of the transfer, so that they may participate in the sales or object to them, if in their judgment they are inequitable and not to the best interests of the stockholders. In this letter you will set forth a date upon which the Board of Directors will receive bids from the shareholders for the properties which are being offered for sale.

[fol. 44] At the request of Mr. Sterling, we will not insist upon this being done before sixty days, in which time your Officers and Directors will decide as to the best plan of disposing of the real estate.

This association has considerable real estate on hand.

We understand that a Mr. Frank has been handling this real estate for the association, collecting rents, making leases, so forth. It is our desire that the association name a reputable, competent real estate man to supervise and handle all matters pertaining to this real estate.

The Department at this time will not object to Mr. Frank collecting the rents and generally looking after the real estate, but he is to make a report and accounting, monthly or oftener if so requested, to your real estate manager as to rents received, bills contracted for and expenses paid. Also, will submit bids for work to be done on this real estate in the way of repairs, etc. to said manager, whose duty it will be to check up carefully and report his opinion, recommendations to the Board of Directors each monthly meeting.

It is to be definitely understood, however that all leases are to be approved by the Board of Directors before they are agreed upon and also that the manager and the Board

of Directors are to approve all sales of properties, settlements, etc. and the advisability of dropping any properties.

The compensation for the work done by your real estate manager and Mr. Frank should be definitely determined by the Board of Directors.

Also because of the fact that the association has a tremendous amount of real estate on hand and may acquire more, it is our desire that the association appoint a reputable, competent attorney to whom will be referred all legal matters of importance, such as suits in equity, settle-
[fol. 45] ments offered by stockholders or mortgagors of the association.

The Department has no objections at this time to Messrs. Bernheimer and Sundheim, the former Conveyancers taking care of minor legal transactions, but it is to be definitely understood that your Counsel, whom you appoint is to be advised and aware of all legal transactions in the associations.

Your Counsel will of course render his opinion and recommendations to the association at each monthly meeting regarding such legal transactions.

The Board of Directors will decide what in their opinion is the proper fee to be paid to your Counsel, as well as to any and all Officers of the association, who are to be compensated for services of any kind.

We would ask that these matters be taken up at the next meeting and the writer advised as to whom the Board has appointed to act for them as manager and supervisor of their real estate, their Counsel and the fees that are to be paid to those who are to be compensated for services rendered.

We understand that two properties were divested by the sheriff sale and that the collateral bonds were not put on record.

We hereby instruct you to see to it that these bonds are put on record immediately.

The properties referred to are as follows:

Loan of $10,000 on premises 229 S. 60th Street, in the Hoover Building and Loan Association. Solicitors, Bernheimer and Sunheim gave collateral bond of $10,000. The equity in the above mentioned mortgage was divested by

sheriff sale, July 1st, 1930. The bond for $10,000 of the Solicitors was not put on record.

Loan of $23,000, subject to $70,000, on premises 234 & 36 S. 8th Street. Equity was divested by foreclosure on first [fol. 46] mortgage. The bond of Bernheimer and Sundheim for $23,000 was not put on record.

The above instructions are to be strictly adhered to until the association is again examined by this Department, which will be sometime after the first of the year.

Very truly yours, William D. Gordon, Secretary of Banking, per H. R. Knowles, Chief Examiner.

EXHIBIT "B" TO PETITION

December 6, 1932.

Finance Committee Mortgage Building & Loan Ass'n.

GENTLEMEN:

The accountant's report shows Mortgage Loans to be the largest single asset of the Association, $1,593,359.20, made up as follows:

MORTGAGE LOANS

1. On shares	$1,055,350.00
2. Without shares	472,755.53
3. Reducing principal	65,253.67
	$1,593,359.20

Analysis of Capital Account shows credits in shares assigned as collateral on these mortgage loans to be $242,-199.00. This, however, is a book figure and does not take into account impairment of capital that arises out of appraisal by John G. Williams. That impairment (com-[fol. 47] mented upon later in this study) amounts to 12.057 per cent, and when deducted from book credit leaves $212,997.07 as capital collateral on the mortgage loans. (Discount is $29,201.93.) If the stock should be cancelled at this amount and credit given on the loans, they would appear as follows:

MORTGAGE LOANS

1. On shares	$842,352.93	
Add arrears and advances	81,815.79	
		$924,168.72
2. Without shares		472,755.53
3. Reducing principal		65,253.67
		$1,462,177.92

It is recommended that mortgagors in group 1, be given opportunity to change the character of their monthly obligations so that hereafter instead of accumulating credit in share account, direct credit will be given for capital payments on account of principal, thus adding this group to the mortgages now in Reducing Principal class. By reason of Mr. Williams' appraisals, a Reserve for Mortgage Loans, $583,753.95, is set up on the Balance Sheet.

Subsidiary Mortgage Loans, $1,001,181.45, represent items originally owned as first or second mortgages, and either foreclosed or properties deeded. Properties are now owned by the Gage Realty Corporation, and mortgages created with this Association as mortgagee. The Williams appraisals estimate these properties to be worth $270,392.52, less than values on the books and Reserve in such amount is set upon the statement. How much of this asset can be protected and for how long a time depends upon the ability of the Association's debtors to meet their obliga-[fol. 48] tions and the skill and persistence exercised in making collections from them.

An important item on the Balance Sheet is Stock Loans, $559,934.00, and as an overall figure it is nearly covered by collateral. In the aggregate, there is share credit, before impairment of $1,009,136.00 as collateral, but discounted at 12.057 per cent (discount in $121,671.53) it amounts to $887,464.47, leaving a margin of $327,530.47 to cover dues and interest arrears of $273,206.08. (Excess stock is $54,324.39.) There are, however, a list of loans inadequately secured, this list showing deficiency of collateral amounting to $72,842.51 and such amount has been set up in a Reserve for Stock Loans. It would seem that a practical policy of stock loan collection would involve payment of loans by cancellation on impaired capital basis of the shares assigned.

On the loans inadequately secured, a vigorous attempt to recover cash should be made, even to the extent of taking court action in cases where borrowers are found not to be judgment proof. It also is likely that some loans adequately secured on the McGee Fleisher analysis will fall short when the impaired capital basis is applied. In any event it does not seem probable that the $54,324.39 of capital remaining to the credit of assigned stock accounts will increase to more than $100,000.00 when adjustments for additional deficit items are made.

Among the Assets appears $612,064.22 for Arrearages. Of these $81,464.70 (A2-3) are for Mortgage accounts, and $273,206.08 (A4-17) are for stock loan accounts. The remainder is thus evidently on account of free shares, to wit: $257,393.44. This latter arrearage is an offset to free share capital of which a major portion has been scheduled for withdrawal. The accountants' analysis of withdrawals does not show separately the unencumbered shares and the [fol. 49] shares assigned on stock loans, so that it is impossible at this time clearly to state what amount of strictly free stock remains to be accounted for. However, subtracting mortgage share credit and stock loan share credit from total share capital, an estimated free share credit unimpaired, would be $1,310,162.50 and on impaired basis would be $1,152,196.21, thus accounting substantially for all roll book share credit as follows:

			Sept. 30	Impairment	Gross New	Arrears	Net New
Mtge.	Shr.	Cap...	$ 242,199.00	$ 29,201.93	$ 212,997.07	$ 81,464.70	$ 131,532.37
S/L	"	"	1,009,136.00	121,671.53	887,464.47	273,206.08	614,258.39
Free	"	"	1,310,162.50	157,966.29	1,152,196.21	257,393.44	894,202.77
			$2,561,497.50	$308,839.75	$2,252,657.75	$612,064.22	$1,640,593.53

The disposition of Mortgage Loan shares and stock loan shares has herein been recommended as to cancellation and appropriation. If now, free shares are reduced to their impaired basis and arrearages deducted, it is suggested that their net amount be added to that of other Capital, viz: Full Paid Stock, Suspended shares, and Adjusted advances, each to bear its proper impairment, and the net total then derived to constitute the remaining capital of the Association. Schedule as follows:

	Sept. 30	Impairment	Net New
Full Paid Stock	$46,500.00	$ 5,606.51	$ 40,893.49
Suspended Stock in Tr.	15,491.37	1,867.79	13,623.58
Adjusted Advance	34,255.00	4,130.13	30,124.87
	$96,246.37	$11,604.43	$ 84,641.94
Free Shares			894,802.77
Free Shares, Excess on S/L			54,324.39
Total			$1,033,769.10
Adjustment for %			15.00
Adjusted Capital			$1,033,754.10

fo. 50] Balance Sheet Before and After Impairments and Cancellations

Assets	Report	After Adjustment	Liabilities	Report	After Adjustment
Cash	$ 74,570.02	$ 74,570.02	Debts	$ 402,389.29*	$ 402,389.29
M/L	1,593,359.20	1,462,177.92	Capital	2,657,743.87	1,033,754.10
Sub. M/L	1,001,181.45	1,001,181.45	Deficit	320,459.18**	0.
S/L	559,934.00	0.	Reserves	1,180,406.53	1,180,406.53
Rec.	45,916.14	45,565.05			
Arrears	612,064.22	0.			
Misc.	33,055.48	33,055.48			
	$3,920,080.51	$2,616,549.92		$3,920,080.51	$2,616,549.92
		*Integrity	282.500.		
		Northern	24,500.		
		Kensington	22.000.		
			329.000.		

** Typed in red.

The Williams appraisal, taken as a test, establishes the insolvency of the Association. It is not practical to cure that condition merely by stockholder acceptance of share impairment. There is litigation under way now, much more pending, and undoubtedly additional suits would be filed were solvency, as such again restored. To collect principal on mortgage by monthly payments subject to monthly reduction of interest, to eliminate stock loans by negotiating appropriation of stock on best terms procurable, and to recognize the ownership of the Association by the remaining stockholders, these, it is submitted, constitute a plan that offers certain advantages:

1. Payment by mortgagors.
2. Reduction of Bank Loans.
3. Economy of Operation.
4. Prospect of distribution to shareholders.

[fol. 51] EXHIBIT "C" TO PETITION

March 1, 1933.

John G. Williams, J. B. Simon, Charles Denby, Jr., Federal Receivers for Mortgage Building and Loan Association.

In re Mortgage Building and Loan Association, in Possession of William D. Gordon, Secretary of Banking

GENTLEMEN:

Please be advised that as Special Deputy and Agent for William D. Gordon, Secretary of Banking in Possession of the business and property of Mortgage Building and Loan Association, I hereby make request for the prompt delivery to me of all books, papers, assets, records, and all other property and effects of Mortgage Building and Loan Association at the office of the Department of Banking of the Commonwealth of Pennsylvania, 13th Floor of the Market Street National Bank Building, Philadelphia, Pa. upon receipt of this notice.

On February 17, 1933, the Secretary of Banking of the Commonwealth of Pennsylvania filed in his Department at Harrisburg a certificate to the effect that he had taken possession of the business and property of Mortgage Building and Loan Association and appointed me Special Deputy as Agent to assist him in continuing or liquidating the business and property of such association. A certified copy of this certificate was according to law filed in the Office of the Prothonotary of Philadelphia County as of Court of Common Pleas No. 5, December Term, 1932, No. 12603.

[fol. 52] Under the provisions of the Banking Act of June 15, 1933, P. L. 809, as amended, where the business and property of an institution, including a building and loan association, under supervision of the Secretary of Banking is "in the hands of a Receiver appointed by any court" the Secretary of Banking may with the approval and consent of the Attorney General after hearing had upon notice, take possession of such business and property.

You were notified of the formal hearing to be held before the Attorney General on February 17, 1933, at Philadelphia, at which time and place you did not appear.

Kindly respond to this demand for a surrender of the property of the Association.

Very truly yours, Richard F. Ennis, Agent for William D. Gordon, Secretary of Banking in possession of the business and property of Mortgage Building and Loan Association.

[fol. 53] EXHIBIT "D" TO PETITION

Philadelphia, Pa., March 4, 1933.

Hon. Richard F. Ennis, Agent for Wm. D. Gordon, Sec'y of Banking in possession of business and property of the Mortgage Building & Loan Association, Market Street National Bank Building, Philadelphia, Pa.

In the Matter of Mortgage Bldg. & Loan Ass'n, U. S. Dist. Ct. E. D. of Pa., Dec. Term, 1932, No. 7535

DEAR SIR:

John G. Williams, J. B. Simon and Charles Denby, Jr., the Receivers appointed by the U. S. District Court for the Mortgage Building and Loan Association have referred your letter of March 1, 1933 to the undersigned for reply.

In view of the fact that the Bill in Equity was filed in the Federal Court, the Receivers appointed and the possession of the assets of the Mortgage Building and Loan Association actually taken by the Receivers thereunder prior to the Secretary filing his Certificate, under well settled principles of law the Federal Court must be regarded as now having exclusive jurisdiction, and the proceedings taken by the Secretary are a nullity.

We have, therefore, advised the Receivers to refuse to comply with your demand.

Yours very truly, Wolf, Block, Schorr and Solis-Cohen, Bernheimer & Sundheim, Grover C. Ladner, Attorneys for Receivers.

[fol. 54] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE—Filed March 27, 1933

And now, to wit, this twenty-seventh day of March, 1933, in consideration of the foregoing petition and on motion of William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, it is hereby ordered and decreed that John G. Williams, Joseph B. Simon and Charles Denby, Jr., show cause why the Commonwealth of Pennsylvania should not be given leave to intervene and why an order should not be entered directing them to deliver over to the Secretary of Banking of the Commonwealth of Pennsylvania all assets and records of Mortgage Building and Loan Association.

Said rule is made returnable the thirty-first day of March, 1933, at 10 o'clock A. M., for answer only.

By the Court.

(Sgd.) Welsh, J.

[fol. 55] IN UNITED STATES DISTRICT COURT

ANSWER TO PETITION OF THE COMMONWEALTH OF PENNSYLVANIA FOR LEAVE TO INTERVENE AND FOR AN ORDER ON RECEIVERS TO SURRENDER DEFENDANT'S ASSETS TO THE SECRETARY OF BANKING—Filed March 31, 1933

To the Honorable, the Judges of said Court:

The answer of John G. Williams, Joseph B. Simon and Charles Denby, Jr., receivers of Mortgage Building and Loan Association, to the petition of the Commonwealth of Pennsylvania for leave to intervene and for an order on the receivers to surrender defendant's assets to the Secretary of Banking, is as follows:

1. Admitted.

2. Admitted, except that said association had not been under the laws of the Commonwealth of Pennsylvania and subject to the supervision of its Department of Banking, pursuant to the provisions of the Banking Act of 1923, as amended and supplemented, since February 9, 1933, on which date the receivers were appointed for it by this Court.

3. Admitted.

4. Admitted, except that since the date of the appointment of the receivers, namely, February 9, 1933, they were not supervised in any way by the Secretary of Banking of the State of Pennsylvania.

5. The averments of fact contained in this paragraph are admitted, but all other averments deponents are advised are conclusions of fact and of law and, therefore, need not be answered.

[fol. 56] 6. The receipt of the letter marked "Exhibit A" and attached to the petition, is admitted, and the same speaks for itself.

7. Deponents are advised that the letter marked "Exhibit A" speaks for itself, and that the averments of paragraph 7 therefore require no answer. Deponents further aver that the Secretary of Banking never took possession of the Mortgage Building and Loan Association, pursuant to, or as a result of the hearing had on June 5, 1931.

8. The averments of fact contained in paragraph 8 of the petition are admitted, but deponents aver that the remaining averments constitute conclusions of fact and of law and require no answer. Deponents further aver that they have no knowledge as to the alleged reasons or causes for the conduct of the association.

9. The averments of fact contained in paragraph 9 of the petition are admitted, but deponents aver that the remaining averments constitute conclusions of fact and of law and require no answer. Deponents further aver that they have no knowledge as to the alleged reasons or causes for the conduct of the association.

10. Admitted, except that such report was submitted on or prior to January 13, 1933.

11. Admitted.

12. Admitted, except that as to subdivision 2 of paragraph 12 of the petition it is averred that the segregated dues instructed to be returned, were those dues collected commencing December, 1932.

13. Deponents are advised, believe and therefore aver that the averments of paragraph 13 of the petition consti- [fol. 57] tute conclusions of law and of fact, and hence require no answer.

14. In answer to paragraph 14 deponents aver that the defendant association continued its corporate existence and operation, but it is denied that it operated under the control of the Department of Banking.

15. It is admitted that the meeting referred to in this paragraph was held, and that the Department of Banking was advised that liquidation was unavoidable and that the Department of Banking should take possession. Deponents are advised that the details set forth in this paragraph as to what occurred at said meeting otherwise, are irrelevant and immaterial in this proceeding and therefore need not be answered.

16. Admitted. Deponents further aver, however, that as is averred in paragraph 15 of the petition, the Secretary of Banking through his agent, H. H. Eshbach, Chief of the Bureau of Building and Loans of the Pennsylvania Department of Banking, knew that the filing of the bill in equity in this case for the appointment of receivers was imminent; and further that as is averred in said bill of complaint, it was filed because a dissenting stockholder of the association, Nice Ball Bearing Company, had obtained affirmance by the Supreme Court of Pennsylvania of a judgment in its favor against the association in the amount of $40,044, and was threatening, and was about to issue execution whereby it would obtain a preference over all other stockholders including those in the same class with it, and that this preference so sought to be obtained was only to be avoided by the application for receivers which was made in this case.

17. Admitted, except as to the allegation that the first knowledge of such appointment was received by peti- [fol. 58] tioner's officers through the Philadelphia newspapers on the following morning. As to this allegation, it is averred that deponents have no knowledge or means of knowledge as to the verity thereof since the means of knowledge are exclusively in possession of petitioner, and they demand proof thereof.

18. The allegations of fact contained in paragraph 18 of the petition are admitted. Deponents aver that all other allegations constitute mere conclusions of fact and of law, and hence require no answer. It is averred that the

remaining portion of this paragraph setting forth the arguments presented to Judge Welsh are not averments of fact that require an answer, and therefore no answer is made to them. It is averred, however, in accordance with paragraph 11 of said petition, that the association was insolvent on December 6, 1932, and the Department of Banking had knowledge thereof at that time.

19. The allegations of fact contained in paragraph 19 of the petition are admitted. Deponents are informed, believe and therefore aver that the remaining allegations constitute conclusions of fact and of law, and hence require no answer. It is expressly denied, however, that either the notice of February 14, 1933, or the hearing of February 17, 1933, was in accordance with the laws of Pennsylvania. On the contrary deponents are informed, believe and therefore aver that both the aforesaid notice and hearing were proceeded with by the Secretary of Banking contrary to existing law.

20. Admitted, except as to the averment of the reason for the non-attendance of the receivers, which deponents are informed, believe and therefore aver constitutes a conclusion of law and therefore requires no answer.

[fol. 59] 21. Admitted.

22. Admitted, except that it is averred that the filing of said certificate of possession was contrary to law; and further it is expressly averred that prior to February 14, 1933, and at all times subsequent thereto, all the assets, books, records and papers and all other property of Mortgage Building and Loan Association have been and are in the actual possession of deponents, and neither said property nor any part thereof has been at any time, or now is in the possession, custody or control of petitioner or any of its agents or officers.

23. It is admitted that the letter marked "Exhibit C" and attached to the petition was received. Deponents are informed, believe and therefore aver that said letter speaks for itself, and that accordingly the remaining averments of paragraph 23 of the petition require no answer.

24. This paragraph is denied in the form stated. It is admitted that in part the Acts of Assembly of the Commonwealth of Pennsylvania provide as set forth in the petition;

but it is denied that paragraph 9 of Section 21 therein set forth in detail refers to a receiver appointed by this Court. Paragraph 2 of the same Act defines the word "Court" as follows:

"Court means the Court of Common Pleas of the County where the banking house or other place of business of the corporation or person in question is located and in which the certificate of liquidation is filed, as required by Section 22 of this Act."

Section 21 further provides:

"III. Is in an unsafe or unsound condition to continue [fol. 60] business: Provided, in such case, That the secretary may forthwith, without such hearing and consent of the Attorney General, take possession of the business and property of any such corporation or person receiving moneys on deposit, when and if, in his opinion the protection of depositors and the public requires such peremptory action * * *"

It is further alleged that Section 22 as set forth in the petition referring to "any court" means Courts of the Commonwealth of Pennsylvania only, as set forth in Section 2 of the Act and as set forth above in full.

25. Admitted.

26. It is denied that the Secretary of Banking has in any wise superseded deponents, but on the contrary it is averred that deponents have not been superseded as receivers by the Secretary of Banking or by anyone else, and they are still actively engaged in the conduct of the receivership. The deponents are informed, believe and therefore aver that the remaining averments of paragraph 26 of the petition constitute conclusions of law and hence require no answer.

27. Deponents are informed, believe and therefore aver that the allegations of paragraph 27 of the petition constitute conclusions of law and of fact, and therefore require no answer.

28. Deponents are informed, believe and therefore aver that the allegations of paragraph 28 of the petition constitute conclusions of law and of fact, and therefore require no answer.

29. Deponents are informed, believe and therefore aver that the allegations of paragraph 29 of the petition constitute conclusions of law and of fact, and therefore require no answer.

30. Denied. On the contrary, deponents aver that the custody of the affairs of Mortgage Building and Loan As- [fol. 61] sociation has been since February 9, 1933, and still is in the sole custody of this Court, and that neither petitioner, its officers or agents, nor any other person other than deponents appointed as receivers by this Court, are entitled to administer the business and affairs of said association. Deponents are advised, believe and therefore aver that the remaining allegations of paragraph 30 of petition constitute conclusions of law and of fact, and therefore require no answer.

31. Deponents further aver that on the sixteenth day of February, 1933, the receivers by their counsel Messrs. Wolf, Block, Schorr and Solis-Cohen, served upon the Secretary of Banking a certified copy of the decree of this Court appointing the receivers, and simultaneously therewith served a notice of such appointment and called special attention to that portion of the decree enjoining any and all persons from interfering with the receivers in the performance of their duties. A true and correct copy of said notice is attached hereto, made part hereof and marked "Exhibit A."

32. Deponents further aver that since their appointment as receivers they have actively assumed the duties of their office and have proceeded with the performance of the same, so that it would be injurious to the interests of the creditors and stockholders of the association if the duties of deponents were terminated and the affairs of the association placed in other hands.

33. Deponents are informed by counsel and therefore aver that the statutory law referred to in the petition has no application to proceedings in Federal courts, and further that if they did such statutes would, to that extent, be unconstitutional and in violation of the provisions of the Constitution and statutes of the United States relating to proceedings in cases of diversity of citizenship.

[fol. 62] 34. Deponents aver that Edwin B. Elson, the plaintiff who filed the bill for appointment of receivers in

the present case, was at that time and still is a resident of the City of New York and State of New York; and Mortgage Building and Loan Association, the defendant in said proceeding, was and is a corporation created under the laws of the Commonwealth of Pennsylvania. Further deponents incorporate herein, by reference, the bill of complaint, the answer thereto, and the decrees appointing receivers in the above proceeding, with the same force and effect as if the same had been duly and at large herein set forth.

Wherefore deponents pray that the petition of the Commonwealth of Pennsylvania be dismissed and the rule granted thereon be discharged.

(Sgd.) John G. Williams. (Sgd.) Joseph B. Simon.
(Sgd.) Charles Denby, Jr.

Duly sworn to by Charles Denby, Jr. Jurat omitted in printing.

[fol. 63] EXHIBIT "A" TO ANSWER

February 16, 1933.

Honorable William D. Gordon, Secretary of Banking of the State of Pennsylvania, Market Street National Bank Building, Philadelphia, Pa.

DEAR SIR:

We are of counsel for John G. Williams and Joseph B. Simon, Receivers in Equity of the Mortgage Building and Loan Association, appointed by the District Court of the United States for the Eastern District of Pennsylvania.

They have handed to us a letter received from you in connection with a meeting you have fixed for Friday morning at 11:00 o'clock.

We take the position that our clients are under the jurisdiction of the United States Court and, therefore, it is not incumbent upon them to attend the meeting as scheduled.

I am enclosing for your information a certified copy of the Decree appointing them, which, as you will see, enjoins all persons from interfering with their performance of their duties.

May I call your attention to paragraphs 4 and 5 particularly of the Decree?

Very truly yours, (Sgd.) Gordon A. Block, for Wolf, Block, Schorr and Solis-Cohen.

GAB:R. Enc.

[fol. 64] IN UNITED STATES DISTRICT COURT

OPINION SUR PETITION FOR AN ORDER ON THE EQUITY RECEIVERS OF THIS COURT TO TURN OVER ASSETS, BOOKS AND RECORDS TO THE SECRETARY OF BANKING—Filed June 17, 1933

WELSH, J.:

In this matter the Attorney General in the name of the Commonwealth of Pennsylvania filed a petition on which this Court granted an order on its Receivers to show cause why the petitioner should not be granted leave to intervene and why an order should not be made directing the Receivers to turn over to the Secretary of Banking of the State of Pennsylvania all assets and records of the Mortgage Building and Loan Association. To this petition an Answer was filed and the cause set down for argument on Petition and Answer. From the record, the Petition and Answer, the following material facts appear:

Edwin B. Elson, plaintiff, is a citizen of the State of New York. He is a stockholder of the Mortgage Building and Loan Association, hereinafter for brevity referred to as defendant. By Bill in Equity containing adequate averments as to jurisdiction as well as sufficient grounds (See Florsheim, et al. v. Natl. Radiator Co., Fed. 2nd, C. C. A. 3, 1933), and confessing Answer admitting facts, this Court appointed John G. Williams and Joseph B. Simon, Receivers, and later added Charles Denby, Jr. No question has been raised as to the regularity of the appointment.

Among the reasons averred in the Bill and strongly urged upon the Court for its action in appointing a Receiver was the fact that the defendant had been organized by a merger of seven organizations, that a nonconsenting stockholder of one of the constituent associations comprising this merger, [fol. 65] to wit, the Nice Ball Bearing Company, had obtained a judgment of $40,044 and was threatening to issue

execution against the defendant, levy upon, seize and apply its assets to the collection of its judgment to the exclusion of other creditors whose claims did not arise out of a former status of stockholder, as well as other non-assenting stockholders of the same class, whose rights were in parity with that of the Nice Ball Bearing Company (see Stone v. New Schiller B. & L. Assn., 302 Pa. 544, 553; Weinroth v. Homer B. & L. Assn., 310 Pa. 265,) and that appointment of a Receiver was necessary to properly conserve the assets and prevent such stockholder from obtaining preference over others of the same class.

Pursuant to said Bill and Answer Receivers were appointed on the 9th day of February, 1933. Thereafter on February 14, 1933, the Secretary of Banking sent a notice to the officers of the Association and to the Receivers to appear at a hearing before him, to show cause why possession should not be taken of the defendant's business and property, because it was "insolvent and in an unsafe and unsound condition to continue business and in the hands of Receivers". The Receivers respectfully declined to attend, and made known their position to the effect that having been appointed by a court of competent jurisdiction and in possession of the assets, the court of their appointment having first taken jurisdiction, must now be regarded as having exclusive jurisdiction.

On February 17, 1933, after hearing, the Secretary of Banking filed what is called a "Certificate of Possession" in Court of Common Pleas No. 5 of Philadelphia County in which Richard Ennis was designated by the Secretary of Banking, Special Deputy to take charge of defendant's [fol. 66] business and property. On March 1, 1933, due demand was made on the Receivers of this court by said Special Deputy to turn over the assets and records of the defendant, which demand was refused, and on March 27, 1933 the Petition now before the Court was filed.

Before discussing the questions raised by the Deputy Attorney General in support of the petition, it should be preliminarily observed that the filing of this petition in the name of the Commonwealth of Pennsylvania is hardly a proper practice in that the State of Pennsylvania is not a proper party to this proceeding, for in its sovereign capacity it has no interest in these proceedings. Its attempted intervention, therefore, makes the case no stronger than if

a receiver of a state court had filed the petition. The correct practice would seem to require that Richard Ennis, Special Deputy Secretary of Banking appointed by the Secretary to take possession of the defendant, should be the petitioner as in the case of O'Neill v. Welch, 245 Fed., P. 261. However, since no objection has been raised on this score, the Court will treat the petition as though filed by the Deputy Secretary of Banking.

If the Court understands the Deputy Attorney General's argument, he urges in support of his petition the following propositions?

1. The Federal Courts have no jurisdiction to appoint receivers for building and loan associations.

2. That the proceedings taken by the Secretary of Banking must be held to relate back to a meeting called by him of the officers and directors prior to June, 1931, as a result of which the Association was permitted to continue business on what was termed a restricted basis, as a consequence of which the proceedings in the State Court, if so related back, become first in point of time.

[fol. 67] 3. In any event by virtue of a provision in the State statute any receiver appointed by any court, State or Federal, must be held to be superseded whenever the Secretary of Banking asks.

The Court cannot agree to any of these propositions which will now be considered in order.

Have the Federal Courts jurisdiction to appoint receivers for building and loan associations? The appointment of receivers in equity in proper cases for corporations is but a branch of the equity jurisdiction of this court, and in absence of an Act of Congress specifically exempting building and loan associations from such jurisdiction, it is hard to see upon what ground the assertion of lack of jurisdiction can logically rest. No extensive review of pertinent authorities should be necessary in view of the clear and convincing opinion of Judge Woolley of our Circuit Court of Appeals in the case of O'Neill v. Welch, 245 Fed. 261 (C. C. A. 3) (1917), where in setting aside the appointment of a receiver of an insurance company at the instance of the Insurance Commissioner of Pennsylvania, because the

doctrine of comity required the Federal Courts to refuse to take jurisdiction after proceedings had first been begun in the state court, it was said:

"It cannot be doubted that the Federal Court in the exercise of its general equity jurisdiction has power to appoint a receiver on a stockholder's bill, determine the corporation solvency and distribute its assets, and that no state statute can impair or destroy that power. It is equally clear that the state court has power in the exercise of its special jurisdiction to determine on the Attorney General's suggestion the solvency of a corporation, deliver its property to an officer with the function of a receiver and destroy its assets; and that there is no Federal statute [fol. 68] which impairs or destroys that power. Therefore, in considering the one question of priority of jurisdiction, we assume that the Federal and State Courts named have concurrent jurisdiction in the appointment of receivers and in administering the affairs of insolvent corporations, though invoked and proceeded with in different ways.

While the two courts have concurrent jurisdiction in the sense that each has the same jurisdiction, it is the policy of the law that the jurisdiction of both shall not be concurrently invoked and exercised, hence it is a well settled rule that as both two courts have concurrent jurisdiction on the subject of an action, the court which first obtains jurisdiction has a right to proceed to its final determination without interference from the other: Pitt v. Rodgers, 104 Fed. 387, 389; 43 C. C. A. 600. In our mixed system of federal and state jurisprudence such a law is not only desirable but necessary. It was, therefore, early held (Taylor v. Taint, 16 Wallace 366, 21 L. Ed. 287) that 'where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted, and that rule applies in both civil and criminal cases. It is indeed, a principle of universal jurisprudence that where jurisdiction is attached to a person or thing, it is (unless there is some provision to the contrary) exclusive in effect until it has wrought its function.' *When, therefore, we find which court first obtained jurisdiction of this controversy, we have answered the question as to which should retain it.*"

The italics are ours. In the O'Neill v. Welch case, the Circuit Court of Appeals then found that the state court had first obtained jurisdiction by reason of the fact that the petition for an order to show cause why the Insurance [fol. 69] Commissioner should not take possession was first filed in that Court by the Attorney General, and consequently set aside the appointment of receivers by the District Court which was made subsequently.

That is not true in the instant case. As will be hereinafter pointed out, it is clear that proceedings were first begun in this Court and not in the State Court and since a proper observance of the doctrine of comity required the court in the O'Neill case to decline jurisdiction because the jurisdiction of the state court was first invoked, so here the State Court should reciprocally decline jurisdiction by reason of the jurisdiction having been here first invoked. See, also, for the same general principle involved Ward v. Foulkrod, 264 Fed. 629 (C. C. A. 3).

These decisions of our Circuit Court of Appeals above quoted from are amply supported by decisions of the U. S. Supreme Court, among which is Leadville Coal Co. v. McCreary, 141 U. S. 475, 12 S. C. 28, 25 L. Ed. 824, in which the same principle was involved as is here involved. In that case a bill in equity was filed in the U. S. Circuit Court upon which a receiver was appointed who took possession of the assets. Three years later a decree was entered ascertaining claims of creditors and directing a sale of the property. After this decree the State Court of Ohio, by decree in accordance with its statutes, dissolved the corporation and appointed a receiver, charged with the statutory duties of holding, managing and disposing of all the corporation's assets and distributing them among creditors.

Thereafter, the property was sold in acordance with the decree of the Federal court; a master's report was filed confirming the sale, and thereupon certain stockholders and creditors appealed. It was argued that the Federal court should have gone no further, and should have turned the [fol. 70] property over to the State receiver for distribution under the State statute because of the dissolution decree, since that was, in effect, it was contended, the death of the corporation, and therefore all subsequent proceedings in connection with the distribution of the assets vested in the State court which had created the corporation. In

the course of its opinion the Supreme Court, speaking through Mr. Justice Brewer, said:

"It is worthy of notice that the case in which the decree of dissolution was entered was not commenced till long after this suit was begun and the receiver had taken possession of the property; that the receiver thus appointed by the state court does not himself come into this court and ask possession of this property; and also that the state court, in its decree of dissolution, expressly recognized the possession of the United States court * * * But we do not care to rest our conclusions on these circumstances. The circuit court takes its jurisdiction, not from the State of Ohio, but from the United States; and the extent of its jurisdiction is not determined by the laws of the State, but by those of the United States. Doubtless, while sitting in the State as a court of the United States, it accepts and gives effect to the laws of the State so far as they do not affect its jurisdiction and the rights of non-resident creditors. It nevertheless exercises powers independent of the laws of the State; and when, in pursuance of the jurisdiction conferred by the laws of the United States, it takes possession of the property of a defendant and proceeds to final decree, determining the rights of all parties to that property, its decree is not superseded and its jurisdiction ended by reason of subsequent proceedings in the courts of the State, looking to an administration of that property in accordance with the laws of the State * * *"

See also Harkins v. Brundage, 276 U. S. 36 (43).

[fol. 71] Finally upon this point it may be said that it is no unusual thing for federal courts to appoint Receivers for building and loan associations, and wherever challenged the jurisdiction of the federal court when first invoked seems to have been upheld. See the following cases, all of which are building and loan association cases:

Towle v. American Bldg. & Loan Assn., 60. Fed. 131 (Ill.)

Sleeper v. Winkle, 122 Fed. 736 (C. C. Ed. Pa. 1903) (Judge McPherson).

American B. & L. & Investment Co. (appointed on stockholder's bill), Towle v. American Building, Loan & Investment Company (supra).

Cumberland B. & L. Assn. (on stockholder's bill). Wilson v. Parvin, 119 Fed. 652 (C. C. A. 6) (1903) (Judge Lurton).

Interstate B. & L. Assn. (on stockholder's bill—primary receiver appointed in C. C., N. D., Ga. 1900). Flynn v. Interstate B. & L. Assn., 141 Fed. 672 (C. C., S. C.) (1905).

Universal Savings & Trust Co. (on stockholder's bill). Universal Savings & Trust Co. v. Stoneburner, 113 Fed. 251 (C. C. A. 4) (1902).

Bluegrass B. & L. Assn. (appointed pendente lite on stockholder's bill). Powers v. Bluegrass, 86 Fed. 705 (C. C., Ky.) (1898) Judge Lurton.

Douglass v. Kavanaugh (name of B. & L. is not revealed in this case but the receiver had been appointed earlier in the same court on a stockholder's bill) 90 Fed. 373 (C. C. A. 6).

[fol. 72] Columbia Mutual Building Assn. (Receivers actually appointed in Federal Court in March, 1902. Miers v. Columbia Mutual Building Assn., 157 Fed. 940 (S. D. of N. Y.) (1907).

Baltimore B. & L. Assn. of Baltimore City (primary receiver had been appointed by this court 1900). Coltrane v. Baltimore B. & L. Assn. of Baltimore City, 110 Fed. 272 (C. C., Md.) (1900).

National Home B. & L. Assn. (primary receiver appointed in Southern District of Ill.). McMurrary v. Gosney, ancillary receiver, in W. D. of Pa., 106 Fed. 11 (C. C., W. D., Pa.) (1901).

New South B. & L. Assn., Miles v. New South B. &. L. Assn., 111 Fed. 946 (C. C., E. D. La.) (1900).

Southern Home B. & L. Assn., Alexander v. Southern Home B. & L. Assn., 110 Fed. 267, (C. C., Ga.) (1900).

Fidelity Trust & Loan Company (receiver had not been appointed). Manorita v. Fidelity Trust & Loan Co., 101 Fed. S. (C. C., S. D. Ala.) (1900).

Michigan Savings & Loan Assn. (appointed in 1901 by E. D. of Mich.). Galloway v. Mich. Savings & Loan Assn., 206 Fed. 241, (C. C. A. 6) (1913).

Southern B. & L. Assn. (primary receiver in N. D. Ala.). Cooper v. Newton, 160 Fed. 190 (C. C., Ga.) 1908.

American B. & L. Assn. (receiver had been appointed). Solomons v. American B. & L. Assn., 116 Fed. 676 (C. C., N. D., Ga.) (1902).

[fol. 73] In this connection also, the case of Turner's Estate, 277 Pa. 110, might be read with profit, wherein it is clearly recognized by the Supreme Court that no state statute can limit the scope of an Act of Congress within its constitutional sphere. Jurisdiction of controversies between citizens of different states is undoubtedly a proper constitutional sphere of congressional action, which is so paramount that both state laws and state policy must give way to it.

2. Next it is argued by the Deputy Attorney General that because the Secretary of Banking issued certain orders to the corporation prior to June 5, 1931, the State proceedings must be held to relate back to that date, the effect of which would be to establish priority in the state court. In order to fully consider this question, it becomes important to review the statute of the State of Pennsylvania which governs the proceedings of the State Court. The pertinent State Statute is the Banking Act of 1923, as amended by the Act of May 5, 1927, P. L., 762, which provides general rules and regulations for the Department of Banking of Pennsylvania. The Banking Act of 1923 is virtually a reenactment of the Banking Act of 1919, which is a codification prepared by the Commissioners appointed in 1917 to codify and revise the State Banking Laws. As indicated in the report of the Commissioners one of the changes made in the Banking Department was to constitute the Commissioner of Banking, as he was then termed, ex officio receiver of all of the State courts, and to provide a convenient and erpeditious procedure whereby he could act as such ex officio receiver.

Accordingly, Section 21 of the Act of 1923 provides as follows:

"The Secretary may, after hearing had upon notice given, with the approval and consent of the Attorney Gen- [fol. 74] eral, take possession of the business and property of any corporation or person subject to the supervision of the department, whenever it shall appear to him that such corporation or person:

I. Has violated any law regulating its or his business, and has persisted in such violation in disregard of an order duly made by the secretary;

II. Is conducting business in an unauthorized or unsafe manner and has persisted in disregard of an order duly made by the secretary;

III. Is in an unsafe and unsound condition to continue business; Provided, in such case, that the secretary may forthwith, without such hearing and consent of the Attorney General, take possession of the business and property of any such corporation or person receiving moneys on deposit, when and if, in his opinion the protection of depositors and the public requires such peremptory action;

IV. Has an impairment of capital, which has not been restored or made good within the time fixed by order of the secretary;

V. Has suspended payment of obligations;

VI. Has neglected or refused to comply with the terms of any lawfully issued order of the secretary;

VII. Has refused, upon proper demand, to submit the records and affairs of the business to the secretary, a deputy, or any duly authorized examiner or agent of the department;

VIII. Has refused to be examined upon oath or affirmation, regarding such affairs;

IX. Is in the hands of a receiver appointed by any court, or in any bankruptcy proceeding, or of an assignee or trustee for creditors appointed by such corporation or person."

[fol. 75] It will be observed that clauses 2 and 6 are inserted to give the Secretary of Banking power to enforce any lawful order which he may impose on any institution under his supervision. It is reasonably clear, therefore, from the reading of this section that it was the intention of the Legislature to give the Secretary of Banking the right to require the discontinuance of unsafe and dangerous practices which might lead to disaster without requiring him to actually take possession of the corporation and wind it up as ex officio receiver. In other words, he is

given in a sense a preliminary discretion to issue orders for the safeguarding of institutions under his supervision without proceeding to the drastic step of taking possession and winding them up.

It is clear, therefore, to the Court that when the Secretary of Banking summoned the officers of the defendant Building and Loan Association to appear before him on Friday, June 5, 1931, it was in no sense a hearing to show cause why he should not, with the approval and consent of the Attorney General, take possession of the business and property of the defendant. On the contrary, his letter establishes that in his judgment such drastic action was not at all necessary and his letter of June 5, 1931, cannot be interpreted otherwise than as certain orders to the officers of the association to conduct their business in a certain manner. Presumably, they did so for the officers of the Association remained in possession of said association and conducted its affairs until the appontment of the Equity Receivers by this Court in February, 1933.

The action taken by the Secretary in 1931 was at the most a mere admonition. It did not even rise to the dignity of a restraining order, and it has been held in East Tennessee, &c., R. Co. v. Atlanta, &c., R. Co., 49 Fed. 608, that a restraining order issued by a Sfate Court is not the [fol. 76] equivalent to the commencement of an action for the appointment of a receiver, the Court in that case saying:

"If it is insisted, however, that the Superior Court of the state had taken control of the property, because, upon an amendment to the bill therein pending, alleging that the officers were permitting a use of the corporation funds for private purposes, it had granted a restraining order enjoining the officers of the road from permitting the use of its funds for other than the purposes of the corporation. This, however, was nothing more than an order to restrain actual or threatened malfeasance of an officer or officers of the corporation, and was in no sense a seizure of the property itself. It indeed was a distinct recognition of the fact that the officers were yet in control. Otherwise, no injunction would have been issued against them."

Finally, the fact that neither the Secretary of Banking nor the Attorney General regarded the hearing held June

5, 1931, in any sense as a commencement of possession proceedings by his Department, would seem to be almost conclusively established by the fact that when the Secretary of Banking finally did determine to move for possession of the defendant, he instituted entirely new proceedings by notifying defendant's officers and directors and the receivers to appear before him at a hearing to be held on Friday, February 17th, at the Philadelphia office of the Secretary of Banking to show cause why possession should not be taken of defendant's business and property because it was insolvent, in an unsafe and unsound condition to continue business, and in the hands of receivers.

The best that can be said from the viewpoint of the petitioner is that his proceedings cannot in any event be held to relate back to a date prior to February 14, 1933. That date is subsequent to the date on which the Federal [fol. 77] Court receivers were appointed. In thus commenting, the court does not mean to rule that the mere issuing of a notice by the Secretary of Banking to show cause why possession of an institution subject to his supervision should not be taken, is equivalent to the commencement of court proceedings and therefore the date upon which the question of priority of proceedings rests. The decision of that question is unnecessary in this case for even that date is subsequent to the filing of the bill.

3. Finally, it is urged upon us by the Deputy Attorney General that we are bound by Section 22 of the Act which provides that the Secretary, after filing his Certificate of Possession, shall supersede a receiver appointed by any court. The pertinent portions of Section 22 of the Act of 1923 read as follows:

"When the secretary shall have duly taken possession of the business and property of a corporation or person as provided in section twenty-one of this act, he shall forthwith make, under his hand and official seal, a certificate setting forth that he has so taken possession, and shall file such certificate in his office, and cause a certified copy thereof to be filed in the office of the prothonotary, who shall index the same in the judgment index under the name of the corporation or person as defendant and the name of the secretary as plaintiff.

From and after the filing of such certified copy in the office of the prothonotary, the secretary shall supersede

any receiver previously appointed by any court for, or any assignee or trustee for creditors appointed by, such corporation or person.

Such superseded receiver, assignee, or trustee shall forthwith file his account in the court having jurisdiction thereof, and pay over and deliver to the secretary all moneys, securities, assets, and property of such corpora- [fol. 78] tion or person in his custody, possession or control. Said court shall allow credit for expenses and for the disbursements properly incurred or made prior to the taking possession by the secretary, and shall allow proper compensation to said receiver, assignee or trustee, and his counsel, which, when determined, shall be paid out of the funds of said corporation or person in the hands of the secretary."

This court does not believe that the term "any receiver by any court" can be fairly interpreted to apply to the Federal Court, because it is to be noted that the word "court" as used in the Act, following the modern method of drafting acts, is defined in Section 2 covering general definitions to mean the Court of Common Pleas (i. e., the State Court). Consequently, when Section 22 uses the word "court," it means Common Pleas Court. Such interpretation is fortified by reference to the annotations of the Commissioners who codified and revised the laws in their report of the Banking Department Act, which was enacted and became the Banking Department Act of 1919 (Act of May 21, 1919, P. L. 209).

From this annotation it appears that the second and third paragraphs of this section were from the prior Act of April 23, 1909, P. L. 167, reference to such Act discloses that it reads the same as the second paragraph of Section 22 with the exception of using the words "Court of Common Pleas" instead of "Court." It is clear, therefore, that the words "Common Pleas" were omitted by the Commissioners who drafted the Banking Department Code of 1919 in the interest of brevity, they having already defined the meaning of the word "Court" to be "Court of Common Pleas." But whether this be the correct interpretation of the term "Court" as used in Section 22, it is clear that the Legislature has no power to limit the [fol. 79] jurisdiction of the Federal Courts, for that is the exclusive prerogative of Congress and of Congress alone.

Leadville Coal Co. v. McCreary, 141 U. S. 475, 12 S. C. 228, 25 L. Ed. 824 (supra).

From time to time by various devices and in various manners the Legislatures of some of the states have endeavored to limit or curtail the jurisdiction of the Federal Courts but such encroachment is not permitted either by the U. S. Supreme Court authorities or those of the Circuit Court of Appeals. Illustrative cases are Lappe v. Wilcox, 14 Fed. (2d) 861, where it was held the State statute compelling arbitration between two parties and directing stay of proceedings could not be made binding upon Federal Courts, the Court saying:

"It is the duty of the Federal Courts to exercise their powers in every case to which their jurisdiction can extend: Hyde v. Stone, 20 Howard 170; Klein v. Berk Construction Co., 260 U. S. 226, and the reason therefor being well stated in the following language: 'But the statutes of the state of New York cannot affect non-residents of the state who have the right denied to inhabitants of the state to invoke the jurisdiction of the Federal Court. From early times it has been consistently held that state statutes which have the effect of impairing the rights and remedies of non-resident suitors entitled to resort to Federal Courts for redress are invalid and ineffective as to such non-resident suitors.' See also Farrell v. Stoddard, Supt. of Insurance of New York, 1 Fed. (2d) 802, in which it was expressly held: 'That the statute even if it intended to supersede existing equitable and common law rights of the Federal Courts, could not do so where the jurisdiction of the court is invoked by a non-resident.' See also Morrill v. American Reserve Bond Co. (C. C.) 151 Fed. 307; Allen, Bank Commissioner, v. U. S., 285 Fed. 678 (C. C. A.). Leadville Coal Co. v. McCreary, 141 U. S. 475; and see also Turner's Estate, 277 Pa. 110."

[fol. 80] In concluding the Court deems it not amiss to answer the suggestion of the Deputy Attorney General in his argument that on the broad grounds of public policy the Federal Courts should exercise a wise discretion and refuse jurisdiction in cases relating to corporations under the supervision of a State Department. Without entering into a discussion of whether so doing would be or would not be a wise exercise of discretion, it is sufficient to say that the Federal Court has no such discretion in the matter.

It has no right to refuse to take jurisdiction in a proper case where a non-resident plaintiff within his legal rights invokes the jurisdiction of the court. To hold otherwise would be to strip a non-resident plaintiff of every vestige of his rights under the Constitution and make him subject entirely to the political, economic and financial policies of the state in which the defendant might reside. Such a theory if carried to its logical conclusion would destroy the union of the states and make our Nation consist, eventually, of forty-eight States bristling with antagonisms, conflicting policies, and jealousies. The public policy underlying the principles in this case referred to by the Deputy Attorney General cannot be construed in such a provincial manner. The Supreme Court has stated so most emphatically in the case of Wilcox v. Consolidated Gas Co., 212 U. S. 19, 55 L. Ed. 82, where Mr. Justice Peckham said:

"When a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (Cohen v. Virginia, 6 Wheat. 264, 404, 5 L. Ed. 257, 291), and in taking it that court cannot *be* truthfully be spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial so long as the parties are citizens of different states, or a question is involved which by law brings the case within the [fol. 81] jurisdiction of the Federal Court. *The right of a party plaintiff to choose a Federal Court when there is a choice, cannot be properly denied.* Re: Metropolitan Receivership, 208 U. S. 90-110, 52 L. Ed. 403-412."

In this case there is no suggestion that Mr. Elson, the plaintiff, is not a bona-fide non-resident of the State of Pennsylvania, nor is there the slightest doubt that he was amply justified in invoking the jurisdiction of this court in view of the fact that there was reasonable ground for fear that a stockholder of similar class was not only in the position to, but was actually taking steps to proceed on a judgment which would result in a preference to the detriment of not only the plaintiff but of other stockholders similarly situated, and indeed, of general creditors, whose prior rights by the law of the State of Pennsylvania are beyond question.

While, of course, like others in interest, he might have requested the Secretary of Banking to act rather than to have filed a bill in the Federal Court, the fact is that he

was not bound to do so. He had a right to invoke the jurisdiction of this court, a right which could not be denied to him.

Upon consideration of the whole record, we are of the opinion that no sufficient grounds have been shown to vacate the Court's appointment of the receivership, and since this is the only purpose for which the petition to intervene has been filed, the petition filed by the Attorney General is dismissed.

Let an appropriate Decree be prepared.

Welsh, J.

[fol. 82] IN UNITED STATES DISTRICT COURT

DECREE

And now, to wit, this twenty-third day of June, 1933, this cause having come on to be heard on argument upon petition of the Commonwealth of Pennsylvania and rule granted thereon to show cause why the Commonwealth of Pennsylvania should not be given leave to intervene and why an order should not be entered directing John G. Williams, Joseph B. Simon and Charles Denby, Jr., receivers of Mortgage Building and Loan Association to deliver over to the Secretary of Banking of the Commonwealth of Pennsylvania all assets and records of Mortgage Building and Loan Association, and answer, it is hereby ordered and decreed that the said petition and rule be and the same are hereby dismissed.

(Sgd.) Welsh, J.

[fol. 83] IN UNITED STATES DISTRICT COURT

PETITION OF THE COMMONWEALTH OF PENNSYLVANIA, INTERVENING PETITIONER, FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS—Filed June 28, 1933

The Commonwealth of Pennsylvania, intervening petitioner, considering itself aggrieved by the decree of this Court entered on the twenty-third day of June, 1933, in the above-entitled cause, wherein and whereby the petition of

the Commonwealth of Pennsylvania for leave to intervene and for an order on the receivers of defendant company to deliver over to the Secretary of Banking of the Commonwealth of Pennsylvania all assets and records of defendant was dismissed, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Third Circuit for the reasons specified in the assignments of error filed, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit. Petitioner further prays that the appeal be allowed without requiring the Commonwealth of Pennsylvania to file a bond with the clerk of this court as security for the costs.

Wm. A. Schnader, Attorney General of the Commonwealth of Pennsylvania. By (Sgd.) Harold D. Saylor, Deputy Attorney General, for the Commonwealth of Pennsylvania.

[fol. 84] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed June 28, 1933

And now, to wit, this twenty-eighth day of June, 1933, the appeal to the United States Circuit Court of Appeals for the Third District is hereby allowed and the prayer of the Commonwealth of Pennsylvania, petitioner, is hereby granted without being required to file a bond with the clerk of this court as security for costs.

Welsh, J.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed June 28, 1933

And now come the intervening petitioner, Commonwealth of Pennsylvania, by its Attorney General, having prayed for an appeal to the United States Circuit Court of Appeals for the Third Circuit, from the final decree of the

United States District Court for the Eastern District of Pennsylvania entered on or about the twenty-third day of June, 1933, dismissing intervening petitioner's petition for a rule on the receivers to show cause why the Commonwealth of Pennsylvania should not be granted leave to intervene, and why the Court should not enter a decree directing its receivers to account to the Court for such administration of defendant's affairs as they have conducted, and thereafter to deliver over to the Secretary of Banking of the Commonwealth of Pennsylvania all assets and records of defendant, and assigns as error therein that the said District Court erred as follows:

First. In ordering and decreeing that the petition of the Commonwealth of Pennsylvania, intervening petitioner, be dismissed, the said decree being:

[fol. 85] "And now, to wit, this twenty-third day of June, 1933, this cause having come on to be heard on argument upon petition of the Commonwealth of Pennsylvania and rule granted thereon to show cause why the Commonwealth of Pennsylvania should not be given leave to intervene and why an order should be entered directing John G. Williams, Joseph B. Simon and Charles Denby, Jr., Receivers of Mortgage Building and Loan Association to deliver over to the Secretary of Banking of the Commonwealth of Pennsylvania all assets and records of Mortgage Building and Loan Association, and Answer, it is hereby ordered and decreed that the said petition and rule be and the same are hereby dismissed.

Welsh, J."

Second. In not ordering and decreeing that the said receivers deliver to the Secretary of Banking of the Commonwealth of Pennsylvania all assets and records of defendant, Mortgage Building and Loan Association.

Wherefore, the Commonwealth of Pennsylvania, intervening petitioner, prays that said order and decree be reversed and that the said Court be directed to enter a decree granting leave to the Commonwealth of Pennsylvania to intervene and directing the receivers to deliver over to the Secretary of Banking of the Commonwealth of Pennsylvania all assets and records of defendant according to

the prayer of the petition of the Commonwealth of Pennsylvania, intervening petitioner, as therein set forth.

Wm. A. Schnader, Attorney General of the Commonwealth of Pennsylvania. By (Sgd.) Harold D. Saylor, Deputy Attorney General, for the Commonwealth.

[fol. 86] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed June 29, 1933

To the Clerk of Court:

SIR:

Please include in the record on appeal in the above-entitled case the following:

1. Docket entries.
2. Pleadings, including the following::

(a) Bill of complaint.
(b) Answer of defendant.
(c) Decree appointing permanent receivers.
(d) Petition of the Commonwealth of Pennsylvania for leave to intervene and for an order on receivers to surrender defendant's assets to the Secretary of Banking.
(e) Rule granted on said petition.
(f) Receivers' answer to petition.

3. Opinion of the Court.
4. Decree dismissing the petition.
5. Assignments of error.
6. Petition for appeal and decree granting appeal.
7. Præcipe for transcript of record sur appeal.

[fol. 87] 8. Clerk's certificate.

And no others.

Wm. A. Schnader, Attorney General of the Commonwealth of Pennsylvania. By (Sgd.) Harold D. Saylor, Deputy Attorney General for the Commonwealth.

[fol. 88] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 89 & 90] In United States Circuit Court of Appeals for the Third Circuit

No. 5238. October Term, 1933

Commonwealth of Pennsylvania, Appellant,

v.

John G. Williams et al., Receivers of Mortgage Building and Loan Association, Appellees

Minute Entry—Oct 13, 1933

And afterwards, to wit, the thirteenth day of October, 1933, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the twenty-fourth day of July, 1934, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 91] In United States Circuit Court of Appeals for the Third Circuit

No. 5238. October Term, 1933

Commonwealth of Pennsylvania, Intervenor-Appellant,

v.

John G. Williams, Joseph B. Simon, and Charles Denby, Jr., Receivers of Mortgage Building and Loan Association, Defendants-Appellees

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before Buffington, Davis and Thompson, Circuit Judges

Opinion—Filed July 24, 1934

Davis, Circuit Judge:

This is an appeal from an order of the District Court dismissing the petition of the Commonwealth of Pennsyl-

vania, wherein it prayed the court to direct the receivers, appointed by it, of the Mortgage Building and Loan Association, hereinafter called the Association, to deliver over to the Secretary of Banking of Pennsylvania all the assets and records of the Association held by them.

This was a stockholder's bill filed against the Association for the appointment of receivers by Edward B. Elson, a resident of the State of New York, who owned stock in the [fol. 92] Association, to the amount of $31,000. The bill alleged that the Association was then, and for a long time had been, insolvent and that the real, actual and fair value of its assets was far less than its liability to stockholders on dues paid in, together with its general indebtedness; that the Association had stopped making loans or collecting dues and that "unless its affairs should be liquidated and its assets distributed under the equitable and impartial supervision of a court of competent jurisdiction," immediate and irreparable damage would be suffered. It, therefore, prayed for the appointment of receivers.

The Association filed an answer in which it admitted its insolvency and joined in the prayer of the plaintiff for the appointment of receivers. They were appointed and took over the assets of the Association. The Commonwealth of Pennsylvania intervened and filed a petition and, as above stated, prayed that the assets of the Association be delivered to the Secretary of Banking of Pennsylvania. The court denied the prayer and entered an order dismissing the petition. From this order, the Commonwealth appealed.

Two questions arise: 1. Did the District Court have jurisdiction and consequent power to appoint receivers? 2. If it had, did it abuse its discretion in appointing them?

The District Court derives its power from the Constitution and from Congress and not from the Commonwealth. Article III, section 2 of the Constitution provides that: "The Judicial power shall extend * * * to controversies * * * between citizens of different states." Congress, pursuant to this authority, has provided that District Courts shall have original jurisdiction of all suits of a civil nature at common law or in equity, where the matter in controversy exceeds, exclusive of costs and interest, the sum or value of $3,000 and is between citizens of [fol. 93] different states. Section 24, Judicial Code. This

is the source of the jurisdiction and power of the District Court in this case.

While sitting in a state as a court of the United States, the federal court accepts and gives effect to the laws of the state, so far as they do not affect its jurisdiction and the rights of non-resident creditors. Yet it exercises powers independent of the state. A state cannot take away the plenary power of the federal courts given to them by Congress, by conferring exclusive jurisdiction of such controversy upon its own courts and administrative bodies, by prescribing exclusive methods of commencing or conducting litigation, by prohibiting the seizure of the subject of the litigation during its pendency, or by any other means. National Surety Co. v. State Bank, 120 Fed. 593, 602; Morrill et al. v. American Reserve Bond Co., 151 Fed. 305, 313; O'Neil v. Welch, 245 Fed. 261, 265; Leadville Coal Co. v. McCreery, 141 U. S. 475, 477.

In the case of National Surety Co. v. State Bank, supra, Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

"When the controversy which this bill discloses arose between these citizens of different states, and was presented to the Circuit Court of the United States, that court had jurisdiction to hear and determine it, and the appellants had the legal right to the opinion and the judgment of that court upon the questions which it presented. This right and this jurisdiction were not conditioned by the fact that the complainants *had or had not like rights or remedies in the state courts,* or by the fact that those courts had or had not concurrent jurisdiction. Indeed, this right and this jurisdiction were provided by the Constitution, and granted by the acts of Congress, for the express purpose of enabling citizens of different states to escape from an adjudication of their rights by state courts which [fol. 94] had concurrent jurisdiction to grant the relief and to administer the remedies which they were seeking in the national courts. The rights of these appellants to their hearing and decree in the federal court, and the jurisdiction of that court to determine their controversy, were independent of state legislation. The state of Nebraska did not grant, and it could not revoke or impair, that right or that jurisdiction."

In the Morrill case, supra, Judge Sanborn further said:

"A federal court sitting in equity has the plenary jurisdiction of the English Court of Chancery, and one of the inherent powers of each court is to take and to hold by its own hands, by its receivers, the control and the possession of mortgaged, pledged, and trust property during the pendency of suits concerning it in those courts whenever in the exercise of a wise judicial discretion these courts are of the opinion that the most speedy and perfect administration of justice and the rights of the parties interested in the property will be best secured by such action. The statutes of the state of Missouri do not by their terms, and the Legislature of that state never, intended that they should in any way limit or impair this power of the federal courts. Moreover, the power of the Circuit Courts of the United States to adjudicate claims and administer remedies in equity is vested in them as a part of the judicial power of the nation by the Constitution of the United States and the judiciary act of 1789, and, as it was not granted by, it may not be revoked, impaired, or limited by, the act of any state. Wherever citizens of different states lawfully invoke the jurisdiction of the federal courts to determine controversies between them which involve the requisite amounts, they have the constitutional right to the conduct of that litigation by the methods, to the administration of the remedies, and to the determination of those controversies by the independent judgments of those [fol. 95] courts; and no state, by conferring exclusive jurisdiction of such issues upon its own courts, by prescribing exclusive methods of commencing or of conducting litigation, by prohibiting the seizure of the subject of the litigation during its pendency, or by any other means, may lawfully strike down that right or take away the plenary power of the national courts to conduct the litigation, to administer their remedies, and in the exercise of their judicial discretion to control the possession of its subject-matter during its pendency in accordance with their established rules of practice, and finally to adjudicate the claims of the parties and to enforce their judgments."

In the case of O'Neil v. Welch, supra, Judge Woolley, speaking for this court said:

"It cannot be doubted that the Federal Court, in the exercise of its general equity jurisdiction, has power to appoint a receiver on a stockholder's bill, determine a corporation's solvency and distribute its assets, and that no State statute can impair or destroy that power."

In that case the District Court in Pennsyvania had appointed a receiver for an insurance company, for the supervision and liquidation of which the Commonwealth had provided the same general complete system that it has for building and loan associations. Judge Woolley further said:

"While the two courts have concurrent jurisdiction in the sense that each has the same jurisdiction, it is a policy of the law that the jurisdiction of both shall not be concurrently invoked and exercised; hence it is a well settled rule that as between two courts having concurrent jurisdiction of the subject of an action, the court which shall first obtain jurisdiction has the right to proceed to its final determination without interference from the other."

In Leadville Coal Co. v. McCreery, supra, the Supreme Court said:

[fol. 96] "The Circuit Court takes its jurisdiction not from the State of Ohio, but from the United States; and the extent of its jurisdiction is not determined by the laws of the State, but by those of the United States. Doubtless, while sitting in the State as a court of the United States, it accepts and gives effect to the laws of the State so far as they do not affect its jurisdiction and the rights of non-resident creditors. It nevertheless exercises powers independent of the laws of the State; and when, in pursuance of the jurisdiction conferred by the laws of the United States, it takes possession of the property of a defendant and proceeds to final decree, determining the rights of all parties to that property, its decree is not superseded and its jurisdiction ended by reason of subsequent proceedings in the courts of the State, looking to an administration of that property in accordance with the laws of the State. It would be an anomaly in legal proceedings if, after a court with full jurisdiction over property in its possession has finally determined all rights to that property, subsequent proceedings in a court of another jurisdiction could annul

such decree, and disturb all rights once definitely determined. No such anomaly exists in the relative jurisdiction of state and Federal courts. The latter having once acquired full jurisdiction, and proceeded to a final determination, may rightfully proceed still further and to an execution of that decree, irrespective of any proceedings in the courts of the State."

These cases are declaratory of the law generally, but they do not deal specifically with controversies arising over quasi public corporations. The Commonwealth of Pennsylvania, in the exercise of its public policy has provided for her quasi public corporations, including building and loan associations, a complete system for incorporation, supervision and liquidation.

The question is as to whether or not the well settled rule of law applies when a controversy involving a quasi public [fol. 97] corporation, such as a building and loan association, arises between citizens of different states. The question comes to this: Is the jurisdiction of the federal court, conferred by federal statutes in accordance with the power granted to Congress by the Constitution, ousted by the public policy of the Commonwealth?

Nowhere has there been any enactment by Congress excepting controversies between citizens of different states involving the liquidation of quasi public corporations from the clear and comprehensive language conferring jurisdiction upon federl courts sitting in equity. But municipal, railroad, insurance and banking corporations have for years been taken away from the jurisdiction of federal courts sitting in bankruptcy, and in 1932, building and loan associations were added to that list. The fact that Congress expressly removed certain quasi public corporations from the jurisdiction of federal courts sitting in bankruptcy, while it did not remove them from the jurisdiction of federal courts sitting in equity, would indicate that it did not intend to do so, and this inference is rendered more plausible and strengthened when it is recalled that those courts have, in proper cases, for a long time been assuming jurisdiction over and liquidating building and loan associations.

In discussing this subject in his opinion in the court below, Judge Welsh said:

"Finally upon this point it may be said that it is no unusual thing for federal courts to appoint Receivers for building and loan associations, and wherever challenged the jurisdiction of the federal court when first invoked seems to have been upheld. See the following cases, all of which are building and loan association cases:

Towle v. American Bldg. & Loan Assn., 60 Fed. 131 (Ill.).

Sleeper v. Winkle, 122 Fed. 736 (C. C. E. D. Pa.).

[fol. 98] American B. & L. & Investment Co. (appointed on stockholder's bill). Towle v. American Building, Loan & Investment Company (supra).

Cumberland B. & L. Assn. (on stockholder's bill). Wilson v. Parvin, 119 Fed. 652 (C. C. A. 6).

Interstate B. & L. Assn. (on stockholder's bill—primary receiver appointed in C. D., N. D., Ga. 1900). Flynn v. Interstate B. & L. Assn., 141 Fed. 672 (C. C., S. C.).

Universal Savings & Trust Co. (on stockholder's bill). Universal Savings & Trust Co. v. Stoneburner, 113 Fed. 251 (C. C. A. 4.).

Bluegrass B. & L. Assn. (appointed pendente lite on stockholder's bill). Powers v. Bluegrass, 86 Fed. 705 (C. C., Ky.).

Douglass v. Kavanaugh, 90 Fed. 373 (C. C. A. 6.).

Columbia Mutual Building Assn. (receivers actually appointed in Federal Court in March 1902). Miers v. Columbia Mutual Building Assn., 157 Fed. 940 (S. D. of N. Y.).

Baltimore B. & L. Assn. of Baltimore City, (primary receiver had been appointed by this court 1900). Coltrane v. Baltimore B. & L. Assn. of Baltimore City, 110 Fed. 272 (C. C., Md.).

National Home B. & L. Assn. (primary receiver appointed in Southern District of Ill.). McMurray v. Gosney, ancillary receiver in W. D. of Pa., 106 Fed. 11 (C. C., W. D., Pa.).

[fol. 99] Southern B. & L. Assn., Alexander v. Southern Home B. & L. Assn., 110 Fed. 267 (C. C., Ga.).

New South B. & L. Assn., Miles v. New South B. & L. Assn., 111 Fed. 946 (C. C., E. D. La.).

Fidelity Trust & Loan Company (receiver had not been appointed). Manorita v. Fidelity Trust & Loan Co., 101 Fed. 8, (C. C., S. D. Ala.).

Michigan Savings & Loan Assn. (appointed in 1901 by E. D. of Mich.). Galloway v. Mich. Savings & Loan Assn., 206 Fed. 241, (C. C. A. 6).

Southern B. & L. Assn. (primary receiver in N. D. Ala.). Cooper v. Newton, 160 Fed. 190 (C. C., Ga.).

American B. & L. Assn. (receiver had been appointed). Solomons v. American B. & L. Assn., 116 Fed. 676 (C. C., N. D., Ga.)."

Our attention has been called to the learned opinion, filed June 30, 1934, of Mr Justice Schaffer of the Supreme Court of Pennsylvania, in which that court, for whose members personally and professionally we have the highest regard, reached the conclusion that a federal court is without jurisdiction in cases involving the liquidation of quasi public corporations because it would infringe upon the public policy of the Commonwealth which has provided a complete system wherein the liquidation has been restricted to her own courts and administrative officers. This conclusion is based not only upon the public policy of the Commonwealth, but also upon the court's interpretation of certain federal court decisions. Mr. Justice Schaffer said: "As we read the decisions of the Federal Appellate Courts, [fol. 100] jurisdiction in situations similar to the present one has been disclaimed by those tribunals."

The following cases are cited and quoted in support of the above statement: Port Newark National Bank v. Waldron, 46 Fed. (2d) 296, 299; O'Neil v. Welch, 245 Fed. 261, 267; Lyon v. M'Keefrey, 171 Fed. 384, 393; Mitchell v. Lay, 48 Fed. (2d) 99; Lee v. Edmunds, 66 Fed. (2d) 122, 125; Bank of Bay Biscayne et al. v. Hankins, et al., 42 Fed. (2d) 209; Shapiro v. Wilgus, 287 U. S. 348. If those cases do disclaim jurisdiction over the issue here involved, that would settle the issue. In order to determine whether or not they do, it is necessary to analyze and discuss them.

From the Port Newark National Bank case, the following is quoted:

"• • • in the present case we regard the Comptroller at the time this bill was filed as having complete dominion

over, and by his bank examiner, full legal control of, the then and future operations of the bank, and that such situation might ultimately require the appointment of a receiver. Consequently, the court below, when the bill was filed, acquired no jurisdiction to shear the Comptroller of the Statutory power to take the further step of appointing a receiver in case insolvency existed and the attempted sale fell through."

This case really has no bearing upon the question to be decided here or which was decided by the Supreme Court of Pennsylvania. This court held in this case that the Comptroller was in possession of the insolvent bank when the bill was presented to the court for the appointment of a receiver and further that the contest was not between two courts of concurrent and co-ordinate jurisdiction, but between the judicial and executive branches of the same [fol. 101] sovereignty, and when that sovereignty had given one branch exclusive control, the other branch could not interfere and thus have "a house divided against itself."

That is not the situation in the case at bar, nor was it the situation in the case in the Supreme Court of Pennsylvania. It is true when the Commonwealth of Pennsylvania provided a complete and exclusive system for the incorporation, supervision and liquidation of her building and loan associations, no state court, which derived its jurisdiction and power from the Commonwealth could appoint a receiver other than the one designated in the act to liquidate insolvent building and loan associations, or proceed by a method different from that provided in the statute. The judicial branch was limited by the exclusive jurisdiction and power which the sovereign Commonwealth had conferred upon its executive branch.

But such is not the situation in the case at bar. This case grows out of a controversy arising between citizens of different states. United States District Courts are given jurisdiction over such controversies, and state governments cannot impair that jurisdiction. When federal courts first exercise their jurisdiction, they can maintain it to the end of the litigation, to the exclusion of a state court having concurrent jurisdiction. That a citizen of another state may invoke the aid of a federal court sitting in Pennsylvania, and thus possess a right not enjoyed by a citizen of

Pennsylvania, as Mr. Justice Schaffer observed, is no argument against the jurisdiction of the federal court in this case. National Surety Co. v. State Bank, supra; Mitchell v. Maurer, 69 Fed. (2d) 233, 241. In the National Surety case, Judge Sanborn said: "This right and this jurisdiction were not conditioned by the fact that the complainants had or had not like rights or remedies in the state courts." It is well settled that any citizen of another state [fol. 102] may come into Pennsylvania and bring any suit of a civil nature at common law or in equity against one of her citizens in the Federal Court which is closed to a citizen of Pennsylvania in the same suit. He must bring suit in the State Court.

Mr. Justice Schaffer further quoted from Judge Woolley in the case of O'Neil v. Welch, as follows:

"The state engaged in this undertaking primarily for the protection of the public. Being for the public, its action is a governmental function. When in its exercise it becomes necessary to protect the public from insolvent or improperly conducted insurance companies, the state pursues a remedy prescribed by the same law that conferred the corporation's rights and defines the state's duties. Given briefly, the Insurance Commissioner, acting through the Attorney General, files in a State court a suggestion of the corporation's insolvency or unlawful conduct. In this way the State acts and in this way the State begins suit. Upon the State's suggestion the court starts a judicial inquiry by directing to the Insurance Company a rule to show cause why the Insurance Commissioner should not take possession of its property, and at the same time (that is at the very beginning of the suit), the court, if it wishes, lays its hand upon the company's property, and by a restraining order holds it within its control pending the inquiry.

"The jurisdiction of the State Court thus invoked is a special jurisdiction conferred by statute as a part of the State's policy of insurance regulation and control. It is not conferred for the protection of corporation's policyholders and creditors alone, but for the protection of the public as well. This clearly appears by the terms of the act; it again appears in the court's decree. In prosecuting an insurance company the State is acting for the public, and the public is in turn interested in the proceeding;

though not nominally present as a party, it is nevertheless present in the person of the Attorney General."

[fol. 103] But a reading of this opinion will disclose that the question before us was not in issue in that case. On page 264 Judge Woolley said:

"As we view the case, it does not present the questions:—whether a Federal Court has power to decree the dissolution of a corporation of the Commonwealth of Pennsylvania in a proceeding in which its jurisdiction first attached; *whether a Federal court has authority to supersede and take away the general control over insurance companies vested by State statute in the Insurance Commissioner, before the Insurance Commissioner has in the exercise of his control begun proceedings in a State court.* • • • All these questions were in some measure considered in the decision and argued on appeal. As we view it, *the case presents the single question: Which court first acquired jurisdiction? No other question is in issue and no other will be decided?*" (Italics ours.)

Consequently if anything was said bearing on the question before us, and we do not think there was, it was obiter dictum and was not decided. Which court first acquired jurisdiction was the only issue decided.

The opinion also quotes from Judge Gray in the case of Lyon v. M'Keefrey, supra, as follows:

"But the court below has clearly exhausted its jurisdiction, so far as the purposes of the original bill are concerned. That bill did not contemplate a dissolution of the corporation and a winding up of its business, indeed, the court was without jurisdiction for that purpose."

That case involved the receivership of the Iron City Trust Company, a Pennsylvania corporation engaged in the general banking business in the City of Pittsburgh, Pa. Its assets largely exceeded its liabilities, but they could not be converted into cash in time to meet its liabilities as they matured. It was alleged that its failure to meet its [fol. 104] obligations would result in vexatious and costly litigation, would subject the assets to attachment and execution, and that they would bring much less than their fair and reasonable value to the great prejudice of the creditors

and stockholders unless they were properly protected by the court.

On the day the bill was filed, the Iron City Trust Company filed its answer admitting the allegations of the bill and joined in the prayer for the appointment of receivers "to the end that all creditors be paid in full, without loss and sacrifice of its assets, so as to preserve the same for its stockholders as well."

On that same day receivers were appointed who proceeded to the discharge of their duties and in due course, they paid in full all the creditors and had left in their hands more than $2,500,000 belonging to somebody. When all the creditors were paid, that exhausted the jurisdiction of the District Court as it did not have power to dissolve the corporation and wind up its affairs.

In the meantime, while proceedings were going on in the Federal Court, the Attorney General of Pennsylvania began proceedings in the Court of Common Pleas of Dauphin County in accordance with the statute for the control and regulation of banking companies, had a decree entered dissolving the corporation and had receivers appointed to wind up its affairs.

Mr. Justice Schaffer further quotes from Judge Gray as follows:

"The defendant corporation was a creature of the laws of Pennsylvania, and by those laws the rules governing its existence were prescribed. The measure of control to be exercised over its own corporations was determinable by the law and policy of the state to which they owed their being. By the legislation here in question, the state of Pennsylvania has seen fit to subject such corporations to [fol. 105] supervision and administrative control and has ordained the proceedings, partly administrative and partly judicial proceeding is not one that may be instituted by determined and their affairs wound up and liquidated. The judicial proceeding is not one that may be intsituted by private parties, but by the Attorney General of the state, acting on behalf of the commonwealth and in the interest of the public. Such a proceeding is not one of which a United States court can have concurrent jurisdiction. It does not involve a controversy between private parties, whether citizens of the same state or of different states."

This refers to the special jurisdiction, partly administrative and partly judicial, to which Pennsylvania has subjected her quasi public corporations, and which can be invoked only by her special agents designated in the statute, but that does not exclude the ordinary jurisdiction of Federal Courts over controversies arising between citizens of different states. The opinion of Judge Woolley in O'Neil v. Welch, supra, settles that question for this court. Immediately following the above quotation, Judge Gray said:

"The Supreme Court of Pennsylvania has decided as we have seen, that such proceeding does not exclude the jurisdiction of the courts, state or federal, as regards the ordinary litigation in which the corporation as a party may be involved, growing out of controversies of a private and civil nature."

That the District Court had jurisdiction was expressly admitted by counsel representing the receiver in that case. Judge Gray said:

"No question as to the right of the court below to take jurisdiction of the cause presented to it by the bill and answer filed October 23, 1907, is here raised: In their brief the counsel for the appellant say:

[fol. 106] 'Our position is that for the purposes of this case we concede the jurisdiction of the circuit court and its receivers to administer this estate up until the time that all creditors had been paid in full and the rights of the complainants in the bill determined, and that the jurisdiction to this extent was not affected nor the proceedings abated by the subsequent dissolution of the corporation by the decree of the state court.'"

Consequently this case has no bearing on the question at issue.

The opinion of the Pennsylvania Court also quotes from the cases of Lee v. Edmunds, 66 Fed. (2d) 122 and Bank of Bay Biscayne et al. v. Hankins et al., 42 Fed. (2d) 209. The following is from the Lee case:

"The decisions of this court have agreed with those of the Supreme Court of Florida that only in a clear case of mismanagement will a court of equity take the assets from a statutory administration * * * Yet a court of equity in case of necessity may appoint a receiver for special prop-

erty in the liquidator's hands, but only on a showing of fraud, corruption, or maladministration or other illegal action of the liquidator."

From the latter case the following is quoted:

"Regardless of the terms used, it is apparent that the order in effect appoints a receiver to control the assets of the failed bank, and enjoins the comptroller from carrying on the liquidation of the institution under provisions of the laws of Florida. A bank organized under the laws of a state is a quasi public institution, and, whenever the laws of the state provide for supervision and control of the affairs of the bank by an authorized official, and also for the ultimate liquidation and distribution of its assets under his direction, in the event of its insolvency, it is a matter of grave consequence for any court to interfere. (Here follows two sentences omitted from the quotation, 'and that should be done only in a perfectly clear case. It does not [fol. 107] appear from the record that such a case is presented here'). The laws of Florida provide an orderly method of liquidating the affairs of an insolvent state bank, in substantially the same manner that federal statutes provide for the liquidation of an insolvent national bank. It is usually a matter of discretion to issue an injunction and appoint a receiver, but the exercise of jurisdiction and the entering of the order appealed from in this case appear to us to be unwarranted."

In the first place, in the Lee case, proceedings had been begun in the state court several months before they were started in the federal court and in view of this fact, it is well settled that the federal court had no jurisdiction and could do nothing else than direct the federal receiver to turn over the assets to the state authorities.

In the case of Bank of Bay Biscayne, the Comptroller of the state had closed the bank and was liquidating it when the receiver was appointed by the federal court. Under such circumstances the court said it was "a matter of grave consequence for any court to interfere," and then added the two significant sentences omitted from the quotation in the decision of the Supreme Court of Pennsylvania. These sentences show that in the opinion of the Fifth Circuit court the federal court does have jurisdiction in a clear case.

The Pennsylvania opinion cites the case of Shapiro v. Wilgus, 287 U. S. 348, where the Supreme Court gave warn-

ing that the appointment of receivers by federal courts at the suit of a simple contract creditor where the defendant was willing to waive the irregularity and consent to the decree, should not be granted loosely as a weapon of coercion or as a means of frustrating the public policy of a state, but should be invoked in the aid of equity to conserve the common fund for the benefit of the suitor with a legitimate [fol. 108] claim and the creditors at large. This bears only on the question of discretion to be exercised by a District Judge.

The opinion of Judge Wilbur of the Circuit Court of Appeals of the Ninth Circuit in the case of Mitchell v. Lay, 48 Fed. (2d) 79, was cited. But that case did not involve the question here in issue, as a mere reading of the opinion will show.

"It would seem clear that before the plaintiff was justified in coming into a court of equity for the appointment of a receiver and the liquidation of the affairs of the insurance company, she should have exhausted her remedy against this special fund deposited for her benefit. *Whether, upon the ground of diversity of citizenship and in default of any judicial proceeding in the state courts, a federal court of equity might enforce the rights of a non-resident to such fund or take jurisdiction thereof, is a question not involved in this case,* for there is no claim that there has been any default or misconduct on the part of any one with reference to the deposit in question." (Italics ours.)

But Judge Wilbur did sit in a case, overlooked by Mr. Justice Schaffer, Mitchell v. Maurer, 69 Fed. (2d) 233, in which this exact question was present.

The International Re-Insurance Corporation, a Delaware Corporation, became insolvent and on March 23, 1933, a bill for the appointment of receivers was filed in the Court of Chancery of Delaware which appointed three receivers on April 19, 1933.

On the same day at 4:45 P. M. a petition was filed in the federal court in California for the appointment of an ancillary receiver. On the same day, but nine minutes later, a similar petition was filed in the State court of California which issued an order restraining the insurance company from transacting business, etc. In the meantime the In- [fol. 109] surance Commissioner of California suspended

the right of the insurance company to transact business in California.

After several orders and counter orders had been made by both the state and federal courts, each trying to get exclusive control of the liquidation of the insolvent insurance company, the Insurance Commissioner of California appealed from an order made by the federal court denying his motion to vacate its order appointing receivers and from an order refusing to rehear the motion to vacate.

The State of California has provided a complete system for the liquidation of her own insurance companies. The Insurance Commissioner contended and the appellees admitted that the state statute directed that the liquidation of insolvent insurance companies proceed in the state court only and that the Insurance Commissioner could not have proceeded in the federal district court. Consequently nonresidents had a right, the choice of a federal court in which to proceed, which citizens of California did not have, but the California court treated that argument as without significance because it held that the federal court had concurrent jurisdiction with the state court over controversies involving quasi public corporations and was exercising that jurisdiction over the same subject matter in similar proceedings and for the same end.

In not one of the federal cases cited or quoted in the Pennsylvania decision has the question in the case at bar, the jurisdiction of the federal court on a controversy involving quasi public corporations arising between citizens of different states, been in issue and not a single court in those cases has pronounced upon it.

The appointment of the receivers in this case arose out of a controversy between the plaintiff, a citizen of the State of New York, and the Association, a citizen of the Common-[fol. 110] wealth of Pennsylvania. Congress has expressly conferred jurisdiction upon federal courts to appoint receivers in equity upon a stockholder's bill in such a case and that power cannot be taken away by state legislatures.

Further we have not been referred to a single case, by very industrious and competent counsel, which holds that in a proper case a federal court sitting in equity is without power to appoint a receiver for a building and loan association. The Attorney General, able and brilliant, virtually admits that the District Court did have jurisdiction, but ought not to have exercised it, for he says: "We are urging

not that the District Court was technically without jurisdiction, but that it ought not to have exercised its jurisdiction."

If it has power, the appointement under the circumstances was a question of discretion. Having exercised that discretion, the final question before us is whether or not in so doing the District Judge abused his discretion. In order to determine that question, a brief review of the facts is necessary.

On May 7, 1932, the Nice Ball Bearing Company secured a judgment against the Association for $40,000.14 in Common Pleas Court No. 2 of Philadelphia County. This judgment was affirmed by the Supreme Court of Pennsylvania on January 16, 1933.

The Secretary of Banking of the Commonwealth of Pennsylvania made an examination of the affairs of the Association and as a result he caused a hearing to be held before the Attorney General and a duly authorized representative of the Department of Banking, concerning the affairs of the Association "which was then and there found to be in an unsafe and unsound condition." The Secretary thereupon instructed the officers and directors of the Associations "to follow a definite course of action to safeguard the interests of defendant's creditors and shareholders." [fol. 111] On that same day the Secretary wrote a letter to the president of the Association in which he placed its "activities on a rigidly restricted basis" and directed it to:

1. Accept no more dues on account of shares of stock.

2. Return segregated dues to stockholders immediately.

3. Credit payments by the borrowers on account of the principal of the obligations, after deducting legal interest.

4. Pay withdrawals pro rata to all stockholders after payment of preferred claims."

And finally said:

"The above instructions to be strictly adhered to until the association is again examined by this Department, which will be sometime after the first of the year."

The Nice Ball Bearing Company threatened to issue execution on its judgment and finally filed a bill in the District Court in which it prayed the court to direct that certain United States Liberty bonds, placed in escrow with the Tradesmen's National Bank and Trust Company of Penn-

sylvania, to secure the surety at the time of the appeal to the Supreme Court of Pennsylvania, be turned over to it, but the court refused and its order was affirmed by this court.

The Association continued to go along and conduct business on this restricted basis while insolvent or in an unsafe and unsound condition from June 5, 1931, until the bill in this case was filed, February 9, 1933, when it was admittedly insolvent, with the interests of all persons who dealt with it or who were connected with it, in jeopardy.

Under these circumstances, we cannot say that the District Judge abused his discretion in appointing receivers. [fol. 112] The plaintiff, who filed the bill in this case has rights arising under the statutes and Constitution of the United States and had the option of choosing his forum for the enforcement of those rights. Having made that choice, it was the duty of the District Court which first assumed jurisdiction to retain it and determine those rights. It is not a question here of comity which in order to avoid an unseemly conflict requires the court last assuming jurisdiction to yield. There was, however, no question as to which court, the state court or the federal court, first acquired jurisdiction. Being a question of right, it was as much the duty of the District Court to retain jurisdiction and determine the matters before it as it would have been to surrender jurisdiction if the state court had first acquired jurisdiction.

It follows that the decree must be affirmed.

A true copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 113] In United States Circuit Court of Appeals for the Third Circuit

No. 5238. October Term, 1933

Commonwealth of Pennsylvania, Appellant,

v.

John G. Williams et al., Receivers of Mortgage Building and Loan Association, Appellees

Order Affirming Decree—Filed July 24, 1934

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of June 23, 1933, of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, July 24, 1934.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 114] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 115] Supreme Court of the United States

Order Allowing Certiorari—Filed October 22, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is assigned for argument immediately following the hearing of case No. 431.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,022. U. S. Circuit Court of Appeals, Third Circuit. Term No. 394. Commonwealth of Pennsylvania, petitioner, vs. John G. Williams, Joseph B. Simon and Charles Denby, Jr., Receivers of Mortgage Building and Loan Association. Petition for a writ of certiorari and exhibit thereto. Filed September 21, 1934. File No. 394, O. T., 1934.

PETITION FOR A WRIT OF CERTIORARI

FILE COPY

SEP 21 19

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934. No. 394

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

JOHN G. WILLIAMS, JOSEPH B. SIMON, and CHARLES DENBY, JR., Receivers of MORTGAGE BUILDING AND LOAN ASSOCIATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

WM. A. SCHNADER,
Attorney General.

HAROLD D. SAYLOR,
Deputy Attorney General.

LEO WEINROTT,
Special Deputy Attorney General,
Counsel for Petitioner.

State Capitol,
Harrisburg, Pa.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934. No.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

JOHN G. WILLIAMS, JOSEPH B. SIMON, and CHARLES DENBY, JR., Receivers of MORTGAGE BUILDING AND LOAN ASSOCIATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the Commonwealth of Pennsylvania respectfully represents:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

(a) The Decrees Below.

Your petitioner is the Commonwealth of Pennsylvania.

The decree which your petitioner seeks to have this Court review is the final decree of the United States Circuit Court of Appeals for the Third Circuit, entered July 24, 1934, affirming the decree of the United States District Court for the Eastern District of Pennsylvania, entered June 23, 1933, in a suit numbered and entitled on the docket of the District Court, "No. 7535, December Term 1932, EDWIN B. ELSON v. MORTGAGE BUILDING AND LOAN ASSOCIATION." The suit was in equity and sought the appointment of receivers to take possession of and liquidate a Pennsylvania Building and Loan Association.

The decree of the District Court dismissed the petition of the Commonwealth of Pennsylvania for leave to intervene and for an order directing John G. Williams, Joseph B. Simon and Charles Denby, Jr., Receivers of Mortgage Building and Loan Association, to deliver over to the Secretary of Banking of the Commonwealth all assets and records of Mortgage Building and Loan Association.

The Commonwealth contends that the decree of the District Court and of the Circuit Court of Appeals affirming it were erroneous in that they denied to the

Commonwealth of Pennsylvania its right to supervise, regulate and liquidate quasi-public corporations, such as banks and building and loan associations, exclusively through its administrative officers.

(b) The Questions Presented.

The questions presented to the Circuit Court of Appeals for the Third Circuit on the Commonwealth's appeal from the decree of the District Court and the questions for review before this Court are:

1. Has a Federal court equity jurisdiction over a quasi-public corporation of a state, such as a bank or a building and loan association, where the bill of complaint is filed by a shareholder who, under the laws of the state creating the corporation, cannot have a controversy with the corporation as to its liquidation?

2. Are state banks and building and loan associations, as quasi-public corporations, subject to the equity jurisdiction of a Federal court and may a Federal court appoint receivers for such corporations when the law of the state under which they are organized provides a complete system for their regulation, supervision and liquidation by an administrative department of the state?

3. If a Federal court has equity jurisdiction to liquidate such corporations, was its exercise of such jurisdiction and the appointment of receivers in this case an abuse of discretion on the part of the court?

4. Has a sovereign state such an interest in a receivership proceeding in a Federal court involving a quasi-public corporation of the state as to entitle it to intervene as a party to the proceedings?

(c) The Statutes Involved.

Challenge of the jurisdiction of the Federal court in this case involves Section 24 of the Judicial Code, as amended (R. S. Secs. 563, 629; 28 USCA Sec. 41 (1)). The right of the Commonwealth of Pennsylvania to administer exclusively through its courts and administrative officers the affairs of banks and building and loan associations was given by the Pennsylvania Act of Assembly of June 15, 1923, P. L. 809, as amended by the Act of May 5, 1927, P. L. 762 (7 PS Secs. 4, 21, 22, 29), and the Department of Banking Code of May 15, 1933, P. L. 565 (71 PS Secs. 733-1, etc.) Pertinent sections of the Act of 1923 are set forth in Appendix "B" attached.

(d) Statement of the Facts.

1. On February 9, 1933, a shareholder of a Pennsylvania building and loan association, named Elson, residing in New York, filed a bill in equity in the District Court of the United States for the Eastern District of Pennsylvania asking for the appointment of receivers to take possession of the association and liquidate its affairs (R.10).

2. Immediately, and without notice of any kind to the respondent association, or to its shareholders and creditors, or to anyone else, Judge Welsh, of the District Court, appointed John G. Williams and Joseph B. Simon temporary receivers for the purpose of liquidating the affairs of the association and distributing its assets to its shareholders and creditors (R. 35, 36).

3. Neither the Secretary of Banking of the Commonwealth of Pennsylvania having supervision over its banks and building and loan associations, nor the Attorney General, nor any deputy, assistant or representative of either of these officers had any knowledge of this action until they read of it in the Philadelphia newspapers. However, on the day before the filing of the bill, namely, February 8, 1933, officers of the association requested that the Secretary of Banking take possession of it and sought assurances from the Secretary that upon doing so he would employ them in certain capacities to liquidate the affairs of the association. The Secretary refused to accede to this request but advised the officers that he would act promptly after consultation with the Attorney General (R. 35). For some time prior to this the association had been liquidating its affairs in accordance with instructions from the Secretary and under his constant supervision (R. 34).

4. On February 10, 1933, at a meeting in the chambers of the appointing judge, at which the temporary receivers, their counsel and officers of the association were present, representatives of the Secretary of Banking and of the Attorney General of Pennsylvania requested Judge Welsh not to make his appointments permanent but to allow the Commonwealth's officers to follow the customary procedure and have the Secretary of Banking, in due course, take possession of the association and liquidate its affairs as contemplated by the laws of Pennsylvania (R. 36, 37).

5. Judge Welsh did not accede to this request. The

association's officers thereupon filed a consent answer which had been authorized at a meeting of the directors held the previous evening. Forthwith the court made permanent the appointment of the two receivers for the association (R. 23, 25, 26), and on February 20, 1933, appointed Charles Denby, Jr., as a third receiver (R. 29). One receiver, Mr. Williams, and an attorney for the receivers, Mr. Sundheim, had been respectively real estate officer and solicitor for the association and were among those who had sought the assurances referred to in paragraph 3 above.

6. On February 17, 1933, pursuant to the provisions of Pennsylvania law, upon approval of the Attorney General following hearing duly held, the Secretary of Banking filed a formal certificate in his office at Harrisburg taking legal possession of the association and on the same day filed a certified copy of such certificate with the Common Pleas Court of Philadelphia County (R. 37, 38).

7. On March 1, 1933, further in accordance with Pennsylvania law, the Secretary of Banking made formal demand upon the receivers to deliver over to him as their successor all books, papers and property of the association. The receivers refused to comply with this demand (R. 38, 39).

8. On March 17, 1933, the Commonwealth filed in the District Court its petition asking for leave to intervene and for a decree directing the receivers to account to the court for such administration of defendant's affairs as they had conducted, and thereafter to deliver over to the Secretary of Banking of the Com-

monwealth of Pennsylvania all assets and records of the defendant association (R. 31).

9. The District Court after hearing argument on June 23, 1933, entered a decree refusing leave to intervene and dismissing the petition (R. 64, 82).

10. On appeal to the Circuit Court of Appeals for the Third Circuit argument was heard on October 13, 1933, and on July 24, 1934, that court affirmed the decree of the District Court.

(e) Rulings of the Court Below.

The Circuit Court of Appeals for the Third Circuit, in affirming the decree of the District Court denying the right of the Commonwealth to intervene and refusing to direct the receivers to deliver over the association's assets to the Secretary of Banking, ruled that the District Court had jurisdiction to appoint receivers of a state building and loan association and that it had not abused its discretion in making the appointment (R. 110, 112).

B. REASONS FOR GRANTING THE PETITION.

1. The decision of the Circuit Court of Appeals for the Third Circuit is in direct conflict with the decisions of other circuits, the review of which has been refused by this Court. It has not differentiated between receivership proceedings for the ordinary business or commercial corporation and for a quasi-public corporation.

AMOS v. TRUST CO. OF FLORIDA, 54 F. (2d) 286 (1931), C. C. A. Fifth Circuit. Certiorari refused. 285 U. S. 559.

MITCHELL v. LAY, 48 F. (2d) 79 (1930), C. C. A. Ninth Circuit. Certiorari refused. 283 U. S. 864.

2. The Circuit Court has upheld the District Court in making available to the shareholder of a state quasi-public corporation, with the collusion of its officers, the remedy of receivership as a weapon of coercion and a means for the frustration of the public policy of the state: SHAPIRO v. WILGUS, 287 U. S. 348 (1932).

3. From the time the Commonwealth of Pennsylvania first established its system for the regulation, supervision and liquidation by the Department of Banking of its banks and building and loan associations until the decision in the present case, it had been generally understood and believed throughout the Commonwealth that quasi-public institutions chartered by the state were not subject to the equity jurisdiction of the Federal courts.

4. The decision of the Circuit Court of Appeals is in conflict with that practice and with the decision of the Supreme Court of Pennsylvania, the court of last resort of that State, rendered in the case of COMMONWEALTH OF PENNSYLVANIA, EX REL. WILLIAM A. SCHNADER, ATTORNEY GENERAL, v. PENN GENERAL CASUALTY COMPANY by opinion filed on June 30, 1934, and antedating the opinion of the Circuit Court in this case. (A copy of the opinion of the Supreme Court of Pennsylvania in that case written by Mr. Justice Schaffer is attached hereto as Appendix "A.")

5. In deciding the PENN GENERAL CASE the Supreme Court of Pennsylvania reached the conclusion that a Federal court is without jurisdiction in cases involving

the liquidation of quasi-public corporations of a state; and any effort of a Federal court to exercise such jurisdiction would create rather than settle controversies and would strike at the public policy of the state which has created a complete system for the liquidation of such corporations, jurisdiction over which is limited by state law to the courts and the administrative officers of the state.

6. The assumption of jurisdiction by the District Court, under circumstances plainly showing collusion by the parties, the court's refusal to permit the Commonwealth to intervene, its denial of the right of the Secretary of Banking to succeed to the receivers under Pennsylvania law and the order of the Circuit Court of Appeals upholding such action, create in the Commonwealth of Pennsylvania for the first time an impossible situation involving the very existence of its entire system of regulation, supervision, and liquidation of quasi-public corporations.

7. The courts below have decided an important question of general law in a way that is untenable. The decision of the Supreme Court of Pennsylvania supporting the heretofore well-recognized practice of non-interference by the Federal courts with the State's complete control over its quasi-public corporations, brings to a head the issue now before this Court.

8. The proper determination of the question here presented is of paramount public importance. It is imperative that this Court promptly and finally settle a conflict existing between the jurisdiction asserted by the Federal courts and that given by state law ex-

clusively to administrative officers and courts of the state. This settlement is necessary in order that there may be effective and unhampered administration of the banking, building and loan association and insurance laws not only of the Commonwealth of Pennsylvania, but of all other states which have set up systems for the governance of corporations subject to similar laws. The Circuit Court of Appeals has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

C. PRAYER FOR WRIT OF CERTIORARI

Wherefore, your petitioner respectfully prays:

(a) That a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and send to this Court on a day certain to be thereafter designated, a full, true and complete transcript of the record and of all the proceedings in said Circuit Court of Appeals in the cause therein entitled, "COMMONWEALTH OF PENNSYLVANIA, Appellant, v. JOHN G. WILLIAMS, JOSEPH B. SIMON, and CHARLES DENBY, JR., Receivers of MORTGAGE BUILDING AND LOAN ASSOCIATION, Appellees," to the end that the said cause may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled, "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, c. 517 (26 Stat. 826), amended by the Act of

February 13, 1925, c. 229 (43 Stat. 938, 28 USCA 347),

(b) That such remedy in the premises be decreed as to this Court may seem appropriate and in conformity with said act; that the decree of the United States Circuit Court of Appeals for the Third Circuit in said cause, and of the District Court of the United States for the Eastern District of Pennsylvania, and each and every part thereof may be reversed by this Court, and said courts below directed to make absolute the rule to show cause why the Commonwealth of Pennsylvania should not be granted leave to intervene and why the District Court should not enter a decree directing its appointees, John G. Williams, Joseph B. Simon, and Charles Denby, Jr., to account to that court for such administration of the affairs of Mortgage Building and Loan Association as they have conducted, and thereafter to deliver over promptly to William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, all assets and records of Mortgage Building and Loan Association, and,

(c) That this Court may make such further order and direction in the premises as may be in accordance with the law to be applied to the facts in this case.

And your petitioner will ever pray.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

By

WM. A. SCHNADER,
Attorney General.

HAROLD D. SAYLOR,
Deputy Attorney General.

LEO WEINROTT,
Special Deputy Attorney General.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF DAUPHIN } ss:

Wm. A. Schnader, being first duly sworn, says that he is the Attorney General of the Commonwealth of Pennsylvania, that he has read the foregoing petition and knows the contents thereof, and that the facts stated therein of his own knowledge are true, and the facts stated on information received from others are averred on information received from reliable sources and he verily believes them to be true; and that as Attorney General he is duly authorized to file this petition and apply for a writ of certiorari as therein prayed for.

WM. A. SCHNADER.

Sworn to and subscribed before me this ...18th... day of September 1934.

ERNESTINE G. LEWIS [SEAL]
Notary Public.

My commission expires August 17, 1936.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. The Opinions of the Courts Below.

The opinion of the District Court for the Eastern District of Pennsylvania filed June 17, 1933, denying the right of the Commonwealth to intervene and refusing to direct the receivers to surrender assets of the building and loan association to the Secretary of Banking is reported in 4 F. Supp. 779.

The opinion of the Circuit Court of Appeals for the Third Circuit, filed July 24, 1934, affirming the decree of the District Court, is not reported.

II. The Jurisdiction.

(a) The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1 (43 Stat. 938, 28 USCA 347) on the ground that the Circuit Court of Appeals has decided an important question of general law in conflict with the decision of the highest court of the Commonwealth of Pennsylvania and has so far sanctioned departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(b) The decree to be reviewed is the decree of the United States Circuit Court of Appeals for the Third Circuit, entered July 24, 1934 (R. 89, 113), affirming the order of the District Court for the Eastern Dis-

trict of the United States, entered June 23, 1933 (R. 82).

(c) The Commonwealth of Pennsylvania specifically set up and claimed in its petition for leave to intervene and for a rule on the receivers of the District Court that the administration of the affairs of an insolvent building and loan association or any other institution under the supervision of the Secretary of Banking by any person or persons other than the Secretary would be contrary to the public policy of the Commonwealth as established by its legislative enactments (R. 40).

(d) The Commonwealth appealed to the Circuit Court of Appeals for the Third Circuit, charging error by the District Court in refusing leave to it to become a party to the proceedings and refusing to order the transfer of the association's assets to the Secretary of Banking. The Circuit Court of Appeals denied the claim of the Commonwealth for the general reason that the bill of complaint seeking appointment of receivers to liquidate the association was filed with the District Court before the Secretary of Banking attempted to take possession of the association and before he filed a certified copy of the certificate with the Court of Common Pleas of Philadelphia County, Pennsylvania.

(e) This case presents a substantial question arising under the laws of Pennsylvania and involving the conflict between the decision of the highest court of that State and that of the Circuit Court of Appeals

for the Third Circuit. It involves not only the continuance of the system created by a sovereign state for the regulation, supervision and liquidation of its quasi-public corporations, by its administrative officers and its courts, but also the existence of the corporations themselves.

III. Statement of the Case.

A full statement of the case has been given in the petition under the heading, "Summary Statement of the Matter Involved" and in the interest of brevity it is not repeated here.

IV. Specification of Errors.

A specification of the errors intended to be urged has been given in the petition under the heading, "Summary Statement of the Matter Involved" and in the interest of brevity it is not repeated here.

V. ARGUMENT

(a) The Facts.

Mortgage Building and Loan Association was chartered on April 7, 1931, by the Governor of Pennsylvania and transacted business under the supervision of the Department of Banking of the Commonwealth (R. 31). Sometime prior to the institution of this suit the Secretary of Banking instructed the association to conduct its affairs on a severely restricted basis in order to conserve its assets in the interests of its creditors and shareholders (R. 34). In compliance with these instructions the association proceeded gradually to liquidate its affairs (R. 34).

On February 8, 1933, officers of the association requested the Secretary of Banking to take possession of the association and employ them as his representatives in liquidating its affairs. Upon his refusal to give assurances to them that he would so employ them and before the Secretary could take possession of the association in accordance with the course prescribed by law, the officers became a party to a proceeding to oust the State officers and deliver the association's assets to private persons appointed by a Federal court (R. 35).

The next day, February 9, 1933, upon application to the United States District Court for the Eastern District of Pennsylvania, temporary receivers of the association were immediately appointed without notice of any kind to the association, to the Department of

Banking or any of its representatives, to any shareholder or creditor of the association or to any other person (R. 35, 36).

Promptly on learning of this action through the Philadelphia newspapers the Secretary of Banking and the Attorney General of the State requested the judge who made the appointment not to make it permanent but to permit the Secretary to liquidate the affairs of the association pursuant to Pennsylvania law (R. 36).

The court did not accede to this request, but forthwith made appointment of its receivers permanent upon filing by the officers of a consent answer authorized the night before by the board of directors of the association (R. 37). These officers included those who had sought to induce the Secretary to give them employment if he took possession. One of them was made a receiver of the association and another, the solicitor, became counsel for the receivers.

The Commonwealth of Pennsylvania filed its petition asking for leave to intervene as a party, and for an order on the court's receivers to deliver over the association's assets and records to the Secretary of Banking, who had in the meantime pursued the steps provided by Pennsylvania law for taking such associations in possession (R. 31).

The District Court refused leave to the Commonwealth to intervene, and dismissed its petition (R. 82).

The Commonwealth appealed to the Circuit Court of Appeals for the Third Circuit, which, following argument sustained the action of the District Court (R. 89, 113). In doing so it did not recognize any distinction in receivership applications for ordinary commercial corporations and those of a quasi-public character.

(b) The Secretary of Banking Was Exercising Full Jurisdiction over Liquidation of Mortgage Building and Loan Association under Pennsylvania Law.

The Pennsylvania Banking Act, approved June 15, 1923, P. L. 809 (7 PS Secs. 4, 21, 22, 29), prescribing the powers and duties of the Department of Banking, provided that its supervision, duties, and powers should extend and apply to all banks and trust companies, private or unincorporated banks, and building and loan associations. (Relevant sections of the act are set forth in Appendix "B")

It provided that when any such institution was in an unsafe and unsound condition to continue business it might, with the approval of the Attorney General, be taken into possession for liquidation by the Secretary of Banking. He could likewise take possession where the association was in the hands of a receiver appointed by any court.

This act was superseded by the Department of Banking Code, approved May 15, 1933, P. L. 565, effective July 3, 1933, which largely reenacted the law in effect when the present case was instituted.

In exercise of the power conferred by the Act of 1923, the Secretary ordered Mortgage Building and Loan Association to liquidate and imposed restrictions for the protection of its stockholders and creditors. The officers acknowledged the propriety of the restrictions imposed and fully recognized the authority of the Secretary of Banking as exercised (R. 34). What these officers did was binding upon the shareholders, including the individual who filed his bill of complaint in the District Court.

Nowhere in the bill of complaint is it charged that the Secretary of Banking was guilty of neglect or delay in performing his duty.

Liquidation was proceeding at a minimum of expense, and without wastage of assets, under the complete supervision of the Secretary. Upon the Secretary's refusal to surrender to the improper demand of the officers the bill was forthwith filed. The Federal judge to whom it was presented immediately, and without notice of any kind to anyone, appointed temporary receivers, and thereby unseated the State officer, who with his complete knowledge of conditions obtaining in the building and loan association field was the proper person in fact and in law to determine what was for the best interests of the association and its members.

Whatever the need for action may have been in view of an alleged threatened attachment of the association's assets, by a judgment creditor, we cannot conceive of any proper reason for the Federal judge mak-

ing permanent the appointment of its receivers on the collusive action of the association's officers.

Section 22 of the Banking Act of 1923 provides as follows:

> "From and after the filing of such certified copy [of certificate of possession] in the office of the prothonotary, the Secretary shall supersede any receiver previously appointed by any court for, or any assignee or trustee for creditors appointed by, such corporation or person."

We do not contend that this State enactment was binding upon the District Court nor that it could affect an ousting of jurisdiction if the court had jurisdiction. We do contend that the Federal court should have recognized the propriety of leaving to the Secretary of Banking exclusive control of the liquidation of building and loan associations as quasi-public corporations of the State. The Federal court in recognition of the comity which should obtain between the Federal and State governments should have acted to preserve the State's system of regulation and liquidation of its building and loan associations, and should not have sought to destroy that system, and submit the creditors and shareholders of this and other associations to the expense of costly receiverships.

If there were any allegation of misfeasance or neglect on the part of the Secretary of Banking, the situation might be different. But no such charge is made in this case nor could it honestly be made.

(c) The District Court Did Not Have Jurisdiction to Appoint Receivers to Liquidate the Building and Loan Association.

Quasi-public corporations, such as insurance companies, banks, trust companies, and building and loan associations, are not subject to the bankruptcy laws (Act of April 11, 1932, c. 38, 47 Stat. 47). A District Court cannot appoint receivers in bankruptcy for a building and loan association and thereafter wind up its affairs. It is our position that what a District Court may not do in a bankruptcy proceeding it likewise may not do in a receivership proceeding.

In his bill the complainant asked for the appointment of receivers to "liquidate the business and property and assets of defendant" (R. 18).

There is no legislative authority in a District Court to appoint a receiver to liquidate a quasi-public corporation of Pennsylvania. The only constitutional provision which could possibly apply is that contained in Article III, Section 2, as follows:

> "The Judicial power shall extend * * * to Controversies * * * between Citizens of different States * * *."

The Act of Congress (R. S. Sections 563, 629; 28 USCA Section 41, (1)) provides that:

> "The district courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and

> costs, the sum or value of $3000, and * * * is between citizens of different States * * *."

Under the system established by Pennsylvania law there cannot be a controversy between a shareholder and a bank or building and loan association regarding the liquidation of the institution. A citizen of Pennsylvania cannot by bill in equity in a Pennsylvania court prevent the Secretary of Banking from liquidating a Pennsylvania bank or building and loan association. If such a bill were filed only the Secretary could be made receiver. (Sec. 22 of the Act of 1923). There would be no justiciable controversy to support a bill seeking the appointment of any other person.

The residence of a building and loan association shareholder beyond the confines of the Commonwealth does not entitle him to any greater rights than those of his fellow shareholders, whose interest in their institution is defined and limited by the law of the state creating it.

In addition to the requirement that there be a controversy, the Judicial Code confers jurisdiction only over suits "of a civil nature, at common law or in equity." This provision has been construed as conferring jurisdiction in equity only where it can be supported by the principles of the High Court of Chancery in England existing at the time of the adoption of our Constitution: LORING v. MARSH, 15 Fed. Cas. p. 905, No. 8515 (Circuit Court, D. Mass. (1865)).

We have been unable to find any case in which the High Court of Chancery assumed jurisdiction to liquidate a quasi-public corporation.

There is no Federal statute which gives jurisdiction to a district court to appoint temporary or permanent receivers for liquidation of a building and loan association.

This phase of the case was not in any way considered in the opinion of the Circuit Court of Appeals, although it was the subject of oral argument and was fully discussed in the Commonwealth's reply brief filed with that court subsequent to oral argument.

In its opinion the Circuit Court of Appeals followed the District Court and cited a list of cases wherein the Federal courts appointed receivers of building and loan associations. It is not stated in the opinion that there was no challenge made in those cases to the jurisdiction of the court.

Furthermore, the court failed to distinguish in any way whatsoever between ordinary commercial or business corporations, for which no special state system for supervision and liquidation exists, and what are known as quasi-public corporations, namely, banks, building and loan associations and insurance companies, for which a very definite and complete system for supervision and liquidation in the public interest does exist.

The Circuit Court erred, as did the District Court, in assuming that between a shareholder and the association a controversy existed. The mere residence of the shareholder beyond the State boundaries gave him no right of action under Pennsylvania law. Unless that law gave him rights with respect to the liquidation

of the association which could become the subject of a controversy, there could be no controversy which he could take to the Federal court, even though in his bill of complaint he asserted diversity of citizenship and the existence of the statutory amount necessary to Federal jurisdiction.

(d) A Federal Court Should Not Exercise Jurisdiction To Liquidate State Quasi-public Institutions.

Even if the District Court had had jurisdiction to appoint the receivers, it would have been an abuse of discretion to do so under the circumstances.

It was not mandatory on the District Court to appoint receivers. The exercise of any power to appoint receivers is discretionary. No citation of cases is necessary to support the statement that "The power to appoint a receiver should be exercised with great care and the utmost caution and only in case of an emergency." Section 7697 of Fletcher's Cyclopedia of Corporations.

Federal courts in deference to State statutes have before this declined to take control of quasi-public institutions even in cases where it was assumed that they had jurisdiction.

In Port Newark National Bank of Newark v. Waldron, 46 F. (2d) 296 (C. C. A. 3rd Cir. 1930), an appointment by a district court of a receiver for a national bank was set aside on the ground that the court had no jurisdiction to shear the Comptroller of the

Currency of the complete dominion over and full legal control of a national bank given to him by statute.

The court said at page 299:

> "* * * This is not a conflict between two courts of co-ordinate jurisdiction, but is one between the judicial and the executive arm of the sovereignty. * * *"

In the instant case it is not argued that the Secretary of Banking is like a receiver appointed by the court, although he is given by statute the powers of such a receiver. These powers he holds and exercises by virtue of his statutory office. Possession by him of the building and loan association or bank is possession by the Commonwealth of Pennsylvania.

Neither the District Court nor the Circuit Court gave any indication of understanding the contention of the Commonwealth that there is a vast difference between appointing receivers for an ordinary commercial or manufacturing corporation where the statutory requirements of jurisdiction are met, and appointing a receiver for a quasi-public corporation and thereby ousting control by the statutory officer designated by the laws of the state creating such corporation.

In the PORT NEWARK NATIONAL BANK CASE the Comptroller of the Currency had been supervising the institution with a view to liquidating it, and was actually conferring with the bank's officers on a plan to save it when the stockholder presented his bill to the District Court. In the instant case the Secretary of Banking had complete dominion over the affairs of

Mortgage Building and Loan Association at the time the complainant's bill was filed.

It is not our contention that we have here a contest between a State court and a Federal court as to which first obtained jurisdiction. All the cases decided by this and other courts to the effect that the court which first obtained jurisdiction may maintain it have no relevancy to this case. For a commercial or ordinary business corporation the calendar or even the clock may determine which tribunal, State or Federal, has obtained jurisdiction. This is not the case, however, where the contest is between a court and a statutory officer who, under state law, is the only person entitled to liquidate the affairs of a quasi-public corporation.

In AMOS v. TRUST CO. OF FLORIDA, 54 F. (2d) 286 (1931), the Circuit Court of Appeals of the Fifth Circuit, speaking through Judge Sibley, said, at page 288:

> "* * * No question of comity between courts arises. The relative priority of the seizure by the comptroller [the Florida officer having the functions of the Pennsylvania Secretary of Banking] and the application for a court receiver is not the controlling question. The liquidator not being an officer of a court in which persons concerned may intervene, he of necessity may be called to answer for dereliction or illegality in his management in any court having jurisdiction in particular matters; but only in extreme cases may his general administration be arrested or substituted by a receiver in equity. * * *"

A petition for writ of certiorari was denied by this Court on April 11, 1932 (285 U. S. 559).

And in LEE v. EDMUNDS, 66 F. (2d) 122, 125 (1933), the Fifth Circuit Court, again speaking through Judge Sibley, stated the rule to be as follows:

> "* * * The decisions of this court have agreed with those of the Supreme Court of Florida that only in a clear case of mismanagement will a court of equity take the assets from the statutory administration. * * * Yet a court of equity in case of necessity may appoint a receiver for special property in the liquidator's hands, but only on a showing of fraud, corruption, or maladministration or other illegal action of the liquidator. * * *"

In BANK OF BAY BISCAYNE v. HANKINS, 42 F. (2d) 209 (C. C. A. 5th Cir. 1930), the District Court attempted to appoint a receiver to control the assets of an insolvent state bank, in place of the state comptroller of Florida occupying a position similar to that of the Secretary of Banking in the instant case. The appellate court reversing the district court said, at page 210:

> "* * * A bank organized under the laws of a state is a quasi-public institution, and, whenever the laws of the state provide for supervision and control of the affairs of the bank by an authorized official, and also for the ultimate liquidation and distribution of its assets under his direction, in the event of its insolvency, it is a matter of grave consequence for any court to interfere, and that should be done only in a perfectly clear case. It does not appear from the record that such a case is presented here. The laws of Florida provide an orderly method of liquidating the affairs of an insolvent state bank, in substantially the same manner that federal statutes provide for the liquidation of an insolvent national bank. * * * It is

> usually a matter of discretion to issue an injunction and appoint a receiver, but the exercise of jurisdiction and the entering of the order appealed from in this case appear to us to be unwarranted."

The same principles are stated in other cases decided by the Federal courts. The State courts themselves uniformly support their statutory systems of control of quasi-public institutions.

In COMMONWEALTH v. PENN GENERAL CASUALTY COMPANY the Supreme Court of Pennsylvania in its opinion filed June 30, 1934 (not yet reported, but printed in Appendix "A"), reached the conclusion that a Federal court is without jurisdiction to appoint receivers to liquidate quasi-public corporations. In the course of his opinion, Mr. Justice Schaffer quoted from the opinions of the circuit courts of appeals of the United States and upheld the contention of the Commonwealth that a Federal court had no right to interfere with the Insurance Commissioner in liquidating the affairs of an insurance company created, supervised and regulated under Pennsylvania law. The Supreme Court affirmed the decree of the Court of Common Pleas of Dauphin County finding the company insolvent and appointing the Insurance Commissioner as statutory liquidator of its affairs.

The company appealed from this decree to the Supreme Court of Pennsylvania for the reason that Judge Welsh, of the United States District Court for the Eastern District of Pennsylvania, had by restraining order sought to prevent the Insurance Commissioner from taking possession of the company's assets.

This restraining order was entered in a proceeding instituted by bill of complaint by a non-resident shareholder of the corporation.

The Circuit Court of Appeals in our present case, had before it the opinion of the Supreme Court of Pennsylvania in the PENN GENERAL CASE, but it refused to be guided by that opinion, on the ground that Federal cases cited by the State court had not involved challenges to the Federal jurisdiction and therefore were not authority for the conclusion of the Supreme Court of Pennsylvania. However, in doing this, the Circuit Court completely ignored the sound statements of the principles of law and comity in those cases.

There exists such a thing as comity and a proper respect and deference on the part of the Federal agencies of government toward those of the state. This compels the assumption that where the state agency is performing its duties, without charge of neglect or misfeasance by its officers, a Federal court should not interfere. Most certainly it should not do so when a non-resident shareholder seeks to wrest control of assets from the state agency and liquidate them through friendly appointees.

Even where a quasi-public corporation is not involved, such respect and deference should be shown. This Court has refused to interfere with decisions of

the circuit courts in cases where they have sustained the state agencies.

AMOS v. TRUST CO. OF FLORIDA, supra.

MITCHELL v. LAY, supra.

In a recent case where a receivership for a commercial corporation was sought, this Court gave warning against the abuse of the practice of appointing Federal receivers upon a consent answer, where the application is predicated on diversity of citizenship.

IN SHAPIRO v. WILGUS, 287 U. S. 348 (1932), Mr. Justice Cardozo said at page 356:

> "We have given warning more than once, however, that the remedy in such circumstances is not to be granted loosely, but is to be watched with jealous eyes. * * * Never is such a remedy available when it is a mere weapon of coercion, a means for the frustration of the public policy of the state or the locality. * * *"

The filing of the bill and consent answer in this proceeding within twenty-four hours of the application for receivership was an effort to frustrate the public policy of Pennsylvania. The District Court became a party to a scheme to deprive the Secretary of Banking and the state court of their jurisdiction over the affairs of the association. The undenied averments of the Commonwealth's petition show the reason for the effort made to achieve this end.

(e) A Federal Court Should Not Assist a Building and Loan Association to Escape the Jurisdiction and Laws of the State Creating It.

Clearly, the association, existing and functioning only because the Commonwealth of Pennsylvania gave it existence and provided a system for the conduct of its affairs in the interest of its shareholders, creditors and the public could not, least of all in a court of equity, nullify the effect of its creator's laws. What it cannot do, its shareholders should not be permitted to do.

Diversity of citizenship and a single claim over $3,000 do not justify a Federal judge in appointing receivers for a quasi-public corporation without notice to anyone.

If the court below is sustained Pennsylvania building and loan associations, banks, trust companies and insurance companies will constantly be at the mercy of a petitioning shareholder who upon the mere filing of a bill of complaint can secure the appointment of temporary receivers, and, perhaps, ruin the institution for all time.

VI. CONCLUSION

Your petitioner respectfully submits that the final determination by this Court of the questions of law involved in this case is of the utmost importance to all shareholders and creditors of state banks, trust companies and building and loan associations.

It is of the gravest consequence that a Federal court be permitted to appoint receivers to take over the affairs of a quasi-public corporation which the law of the state giving it existence contemplates shall be supervised, regulated and liquidated only by the statutory officer designated for that purpose.

Avoiding the only issue in the case, the court below has confirmed the appointment of receivers for Mortgage Building and Loan Association and has completely ousted the control of the state officer on the mere pretext that a bill of complaint was filed before the state officer attempted or could attempt to take possession.

The decision of the Circuit Court of Appeals herein is not only contrary to law but is contrary to the sound principles of comity between the State and Federal agencies of government.

Unless the errors in that decision be corrected by this Court, the ultimate consequences may be the destruction not only of the State systems of supervision which have been in force for years in the Commonwealth of Pennsylvania and other states, but also of the quasi-public institutions created, maintained and preserved thereunder.

It is vital that this Court determine this question of paramount public importance. State systems which provide for the governance of banks, trust companies, building and loan associations and insurance companies, must be preserved inviolate and be secured in

future against unrestricted and unregulated attack by persons, technically non-resident shareholders, but actually mere pawns for professional receivership practitioners.

The Commonwealth of Pennsylvania asks this Court to issue its writ of certiorari to the Circuit Court of Appeals, and after a review of the case to reverse the decrees of the courts below, and to direct the District Court to permit the Commonwealth to intervene in the proceeding, and to order the receivers to account to the District Court, and to deliver the assets of the association to the Secretary of Banking.

Respectfully submitted,

WM. A. SCHNADER,
Attorney General.

HAROLD D. SAYLOR,
Deputy Attorney General.

LEO WEINROTT,
Special Deputy Attorney General.
Counsel for Petitioner.

APPENDIX "A"

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

Commonwealth of Pennsylvania, ex. rel. William A. Schnader, Attorney General, v. Penn General Casualty Company, Appellant. No. 28 May Term, 1934.

Appeal from Decree of Court of Common Pleas of Dauphin County, No. 343, Commonwealth Docket, 1933.

OPINION OF THE COURT.

Filed June 30, 1934

Schaffer, J.

This case involves a conflict of jurisdictions between the State and Federal Courts in the winding up of the affairs of an insolvent insurance company. The appeal is by the company from the decree of the Court of Common Pleas of Dauphin County making absolute a rule to show cause why the appellant should not be dissolved, its charter vacated and its affairs liquidated by the Insurance Commissioner, who was directed by the decree forthwith to take possession of the property of the company. The position of appellant is that as a proceeding had been commenced against it in the Federal Court prior to the action in the State tribunal, the latter's jurisdiction was ousted.

Appellant is a Pennsylvania corporation organized under the Insurance Company Law of May 17, 1921, P. L. 682, 40 PS Sec. 341. It conducted its business under the supervision and regulation of the Insurance Commissioner. On September 14, 1933, pursuant to a citation by the Commissioner, appellant's officers and directors attended a hearing before him, at which the president of the company was ordered to return to it assets he had improperly removed and illegally invested to the serious impairment of its financial stability. On October 14, 1933, a hearing was held before the Attorney General, at which it was established that the further transaction of business by the company would be hazardous to its policy holders, its creditors and the public. Thereafter negotiations were conducted by the Commissioner with the stockholders of the company in an effort to rehabilitate it and to place it in position to resume business. Pending these negotiations, on November 17, 1933, a resident of West Virginia, claiming to hold four shares of appellant's capital stock, filed in the United States District Court for the Eastern District of Pennsylvania a bill in equity for the appointment of receivers for the company and its liquidation. On December 8, 1933, while that bill was pending, the Attorney General of Pennsylvania filed in the court below his petition averring appellant to be in such condition that its further transaction of business would be detrimental and hazardous to its policy holders, creditors and the public. The same day the court below issued an order enjoining appellant from transacting business and disposing of its property. On December 14, 1933, appellant filed an answer in the District Court proceedings denying that

the complainant was a resident of West Virginia and that he was the registered owner of four shares of its stock. On the same date the court below issued a further order restraining appellant from surrendering possession of any of its books or assets to any person other than the Insurance Commissioner. The following day, December 15, 1933, the Federal Court, on the application of complainant's counsel, issued its restraining order of substantially similar import. On December 18, 1933, appellant filed a denying answer to the petition of the Attorney General and set up the pendency of the bill against it in the Federal Court. Thereafter a hearing was held in the court below at which the Attorney General presented testimony sustaining the allegations of his petition. Appellant offered no defense. Subsequently the court below entered the decree from which this appeal was taken.

The position of appellant is that both courts have concurrent jurisdiction over it and that as the jurisdiction of the Federal Court first attached, its jurisdiction is now exclusive. It furthermore points out that the Act of May 17, 1921, P. L. 789, 40 PS Sec. 201, does not in terms confer exclusive jurisdiction on the State Court. We think the latter fact of little or no consequence for the reason that if the Federal Court has jurisdiction, its cognizance of the actions could not be ousted by a State statute declaring that its courts have exclusive jurisdiction.

Pennsylvania has provided a most complete system for the regulation and liquidation of insolvent insurance companies and the winding up of their affairs in

"The Insurance Department Act of 1921", approved May 17, 1921, P. L. 789, 40 P.S. sec. 1, and "The Insurance Company Law of 1921", approved May 17, 1921, P. L. 682, 40 P.S. sec. 341. Speaking of the former act, we said in Com. *v.* Equitable Casualty & Surety Co., 306 Pa. 19, that it is a comprehensive statute regulating the business of insurance in the Commonwealth. Section 201 (40 P.S. sec. 41) establishes the insurance department and charges it with the execution of the laws of the Commonwealth in relation to insurance. Section 213 (40 P.S. sec. 51) directs the Commissioner to require every domestic insurance company to keep its books and records in such manner that his representatives may readily verify its annual statements and ascertain whether it has complied with the provisions of the law. The statute requires him to examine each company at least once in three years to ascertain its financial condition, its ability to fulfill its obligations, and its compliance with the provisions of law. Section 502 (40 P.S. sec. 202) provides that whenever any domestic insurance company is insolvent, or has refused to submit its books, &c., to the inspection of the Commissioner, or has neglected or refused to observe an order made by him to make good a deficiency in its capital or transferred its property or merged with another company without the Commissioner's approval, or if found after examination to be in such condition that its further transaction of business will be hazardous, or has violated its charter or any law of the Commonwealth, or whenever any officer has refused to be examined under oath touching its affairs, the Commissioner shall communicate the facts to the Attorney General, who shall after

hearing apply to the Court of Common Pleas of Dauphin County or the court of the county in which the principal office is located for an order directing such company to show cause why its business should not be closed and the Commissioner should not take possession of its property and conduct its business and for other relief. Section 507 (40 P.S. sec. 207) provides that if any receiver of an insurance company is appointed on motion of the Attorney General at the instance of the Insurance Commissioner, such receiver shall supersede any receiver previously appointed by the decree of any court of this Commonwealth.

An examination of all the insurance statutes shows that they provide a complete system for the incorporation, management, supervision and liquidation of insurance companies created under the laws of this Commonwealth. In view of this situation and having due regard for the comity which should exist between the Federal and State Courts, it would seem that the former should not take jurisdiction to liquidate and wind up domestic insurance companies when the complete machinery to do so has been set up by the State. At the very time the Federal Court asserted its jurisdiction, the Insurance Commissioner was exercising his full prerogatives over the appellant.

There is and ought to be a wide difference between the jurisdiction of the Federal Courts over the generality of corporations and over those of a quasi-public character where the State creating them, because of their public nature, has provided a complete system for their liquidation by its public officers. If insurance companies are to be liquidated through the Federal

Courts, so may State banks and building and loan associations. Such corporations have been differentiated from others in Federal legislation. They are not subject to the Bankruptcy laws: Act of February 11, 1932, c. 38, 47 Stat. 47, 11 U. S. C. A. Sec. 22.

The only grant of power to the United States which can be invoked to vest jurisdiction in its courts for the liquidation of such corporations as the appellant is Article III, Section 2 of the Constitution, which provides: "The judicial power shall extend * * * to controversies * * * between citizens of different states." This language is carried into the Judicial Code (R. S. Secs. 563, 629; 28 U. S. C. A. Sec. 41). Both Constitution and Code require that there must be a "controversy." Under the system of supervisory regulation over insurance companies established by the laws of Pennsylvania there cannot be a controversy in the State courts between a stockholder and an insurance company regarding the liquidation thereof. The power to liquidate insurance companies rests solely in the Insurance Commissioner. A citizen of Pennsylvania cannot, by bringing a bill in equity in a Pennsylvania court against a Pennsylvania insurance company, prevent the Insurance Commissioner from liquidating. If the District Courts of the United States have jurisdiction in cases such as the pending one, a citizen of another state would have rights superior to those of a citizen of Pennsylvania.

As we read the decisions of the Federal Appellate Courts, jurisdiction in situations similar to the present one has been disclaimed by those tribunals. In Port Newark Nat. Bank of Waldron, 56 Fed. (2d) 296, a

District Court appointed a receiver to take charge of the affairs of a national bank. The Comptroller of the Currency thereafter appointed a receiver under the provisions of the United States statutes. The Comptroller then appealed from the decree appointing the first receiver. In the course of his opinion reversing the District Court, Judge Buffington of the Circuit Court of Appeals said, page 299: "* * * in the present case we regard the Comptroller at the time this bill was filed as having complete dominion over, and, by his bank examiner, full legal control of, the then and future operations of the bank, and that such situation might ultimately require the appointment of a receiver. Consequently, the court below, when the bill was filed, acquired no jurisdiction to shear the Comptroller of the statutory power to take the further step of appointing a receiver in case insolvency existed and the attempted sale fell through."

In Lyon *v.* McKeefrey, 171 Fed. 384, the Circuit Court of Appeals for the Third Circuit had before it the question of the jurisdiction of a District Court to appoint receivers and liquidate a Pennsylvania State bank. At page 393, Judge Gray said: "But the court below has clearly exhausted its jurisdiction, so far as the purposes of the original bill are concerned. That bill did not contemplate a dissolution of the corporation and a winding up of its business, indeed, the court was without jurisdiction for that purpose." In that case the bill had been amended after it was originally filed so as to include a prayer for a winding up of the bank and the distribution of its assets. In that connection, the learned judge said, page 393: "But, apart from the propriety of allowing the amendment (a

matter largely within the discretion of the court) it is clear that the court could not grant the prayer of the bill as amended." Referring to the nature of the corporation involved and the consequent relationship of the State to it, Judge Gray said: "The defendant corporation was a creature of the laws of Pennsylvania, and by those laws the rules governing its existence were prescribed. The measure of control to be exercised over its own corporations was determinable by the law and policy of the state to which they owed their being. By the legislation here in question, the State of Pennsylvania has seen fit to subject such corporations to supervision and administrative control and has ordained the proceedings, partly administrative and partly judicial, by which the life of such corporations may be determined and their affairs wound up and liquidated. The judicial proceeding is not one that may be instituted by private parties, but by the Attorney General of the State, acting on behalf of the Commonwealth and in the interest of the public. Such a proceeding is not one of which a United States court can have concurrent jurisdiction. It does not involve a controversy between private parties, whether citizens of the same state or of different states."

In Mitchell *v.* Lay, 48 Fed. (2d) 79, Judge Wilbur of the Ninth Circuit reversed the District Court and directed a receiver already appointed to turn over the assets of an insurance company to the State Insurance Commissioner as soon as the Commissioner "has secured an appointment as receiver thereof in the action now pending in the State court." In Lee *v.* Edmunds, 66 Fed. (2d) 122, 125, the Circuit Court of Appeals of the Fifth Circuit said: "The decisions of this Court

have agreed with those of the Supreme Court of Florida that only in a clear case of mismanagement will a court of equity take the assets from the statutory administration. * * * Yet a court of equity in case of necessity may appoint a receiver for special property in the liquidator's hands, but only on a showing of fraud, corruption, or maladministration or other illegal action of the liquidator." In Bank of Bay Biscayne v. Hankins, 42 Fed. (2d) 209, the District Court appointed a receiver to control the assets of an insolvent state bank in place of the State Comptroller of Florida acting under statutory authority. The Circuit Court of Appeals in reversing the District Court's action and remanding the case with directions to dismiss the bill, said at page 210: "Regardless of the terms used, it is apparent that the order in effect appoints a receiver to control the assets of the failed bank, and enjoins the Comptroller from carrying on the liquidation of the institution under the provisions of the laws of Florida. A bank organized under the laws of a State is a quasi-public institution, and, whenever the laws of the State provide for supervision and control of the affairs of the bank by an authorized official, and also for the ultimate liquidation and distribution of its assets under his direction, in the event of its insolvency, it is a matter of grave consequence for any court to interfere. * * * The laws of Florida provide an orderly method of liquidating the affairs of an insolvent State bank, in substantially the same manner that Federal statutes provide for the liquidation of an insolvent national bank. * * * It is usually a matter of discretion to issue an injunction and appoint a receiver, but the exercise of jurisdiction and

the entering of the order appealed from in this case appear to us to be unwarranted."

In O'Neil *v.* Welch, 245 Fed. 261, the Circuit Court of Appeals of the Third Circuit had for consideration Pennsylvania's right to administer the affairs of the insurance companies through its Insurance Commissioner. The Commissioner through the Attorney General had proceeded in the State court under the State statute against a Pennsylvania insurance company. Thereafter, a nonresident stockholder filed a bill in the District Court, alleging insolvency and asking for the appointment of a receiver. The defendant company filed a consent answer. The day before the proceedings in the State court came to a hearing upon a rule theretofore granted, the District Court appointed a receiver. The Attorney General thereupon filed a petition in that court to vacate the appointment. The District Court dismissed the petition and on appeal the Circuit Court of Appeals reversed. Judge Woolley, in writing the opinion, said at page 267: "The State engaged in this undertaking primarily for the protection of the public. Being for the public, its action is a governmental function. When in its exercise it becomes necessary to protect the public from insolvent or improperly conducted insurance companies, the State pursues a remedy prescribed by the same law that conferred the corporation's rights and defined the State's duties. Given briefly, the Insurance Commissioner, acting through the Attorney General, filed in a State court a suggestion for the corporation's insolvency or unlawful conduct. In this way the State acts and in this way the State begins suit. Upon the

State's suggestion the court starts a judicial inquiry by directing to the insurance company a rule to show cause why the Insurance Commissioner should not take possession of its property, and at the same time (that is at the very beginning of the suit) the court, if it wishes, lays its hand upon the company's property, and by a restraining order holds it within its control pending the inquiry. The jurisdiction of the State court thus invoked is a special jurisdiction conferred by statute as a part of the state's policy of insurance regulation and control. It is not conferred for the protection of corporations' policyholders and creditors alone, but for the protection of the public as well. This clearly appears by the terms of the act; it again appears in the court's decree. In prosecuting an insurance company the State is acting for the public, and the public is in turn interested in the proceeding; though not nominally present as a party, it is nevertheless present in the person of the Attorney General."

In Shapiro *v.* Wilgus, 287 U. S. 348, where the receivership was obtained by a filing of a consent decree, the Supreme Court of the United States gave warning against the abuse of the practice of appointing Federal receivers upon a consent answer, where the application is predicated on diversity of citizenship. The court said, page 356: "We have given warning more than once, however, that the remedy in such circumstances is not to be granted loosely, but is to be watched with jealous eyes. * * * Never is such a remedy available when it is a mere weapon of coercion, a means for the frustration of the public policy of the state or the locality." The filing of the bill in this

case by the alleged stockholder of the company in the Federal Court was an obvious effort to frustrate the public policy of Pennsylvania.

Believing as we do that the Federal Court was without jurisdiction and that the action of the court below was proper, we affirm the decree at appellant's cost.

APPENDIX "B"

Excerpts from the Pennsylvania Act of June 15, 1923, P. L. 809, as amended by the Act of May 5, 1927, P. L. 762, entitled:

> "An act relating to the organization, maintenance, and operation of the Department of Banking, and the scope of its supervision and control over corporations, partnerships, unincorporated associations, and individuals, and the assets and liabilities thereof; providing penalties for the enforcement of its provisions; and repealing The Banking Department Act of nineteen hundred and nineteen, with table of contents."

Section 4:

> "There shall continue to be a separate and distinct department, known as the Department of Banking, charged with the supervision of all the corporations and persons hereinafter described, and with the duty of taking care that the laws of this Commonwealth in relation thereto shall be faithfully executed, and that the greatest safety to depositors therein or therewith and to other interested persons shall be afforded.
>
> "The said supervision, duties, and powers shall extend and apply to the following corporations now or hereafter incorporated under the laws of this State or under the laws of any other state and authorized to transact business in this State; namely, all such corporations having power to receive and receiving money on deposit or for safekeeping otherwise than as bailee, including all banks, banking companies, cooperative banking associations, trust, safe deposit, real estate, mortgage, title insurance, guarantee, surety and in-

demnity companies, savings institutions, savings banks, and provident institutions. The said supervision, duties, and powers shall also extend and apply to mutual savings funds, building and loan associations, and corporations doing a safe-deposit business only."

Section 21:

"The secretary may, after hearing had upon notice given, with the approval and consent of the Attorney General, take possession of the business and property of any corporation or person subject to the supervision of the department, whenever it shall appear to him that such corporation or person:

* * * * *

"III. Is in an unsafe or unsound condition to continue business: Provided, in such case, That the secretary may forthwith, without such hearing and consent of the Attorney General, take possession of the business and property of any such corporation or person receiving moneys on deposit, when and if, in his opinion, the protection of depositors and the public requires such peremptory action;

* * * * *

"IX. Is in the hands of a receiver appointed by any court, or in any bankruptcy proceeding, or of an assignee or trustee for creditors appointed by such corporation or person."

Section 22:

"From and after the filing of such certified copy in the office of the prothonotary, the secretary

shall supersede any receiver previously appointed by any court for, or any assignee or trustee for creditors appointed by, such corporation or person.

"Such superseded receiver, assignee, or trustee shall forthwith file his account in the court having jurisdiction thereof, and pay over and deliver to the secretary all moneys, securities, assets, and property of such corporation or person in his custody, possession, or control. Said court shall allow credit for expenses and for the disbursements properly incurred or made prior to the taking possession by the secretary, and shall allow proper compensation to said receiver, assignee, or trustee, and his counsel, which, when determined, shall be paid out of the funds of said corporation or person in the hands of the secretary."

Section 29:

"Except as herein otherwise provided, the secretary shall, when he has taken possession of the business and property of a corporation or person, have all the rights, powers, and duties of a receiver appointed by any court of equity in this Commonwealth; and he shall be vested, in his official capacity, with all the rights, powers, and duties of such corporation or person and with all the property of such corporation or person, including debts due, liens, or securities therefor, and rights of action or redemption, whether or not the property of such corporation or person, including debts due, liens, or securities therefor, and rights of action or redemption, are held in the name of such corporation or person, or in the name of some other corporation or person, but actually the property of the corporation or person of which, or of whom, the secretary has possession.

"He shall be the representative of the creditors of the corporation or person, and entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or incumbrance, which could have been avoided by the creditors or any of them, or by which it is attempted to give any creditor unlawful preference over another."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934. No. 394

COMMONWEALTH OF PENNSYLVANIA,
Petitioner.

v.

JOHN G. WILLIAMS, JOSEPH B. SIMON, and CHARLES DENBY, JR., Receivers of MORTGAGE BUILDING AND LOAN ASSOCIATION

BRIEF FOR PETITIONER

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

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IN THE

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OCTOBER TERM, 1934. No. 394

COMMONWEALTH OF PENNSYLVANIA,
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JOHN G. WILLIAMS, JOSEPH B. SIMON, and CHARLES DENBY, JR., Receivers of MORTGAGE BUILDING AND LOAN ASSOCIATION,

---

BRIEF FOR PETITIONER

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

---

This case comes before the Court on writ of certiorari issued to review a final decree of the Circuit Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania, delivered by Judge Welsh on June 17, 1933, is reported in 4 F. Supp. 779.

The opinion of the Circuit Court of Appeals for the Third Circuit, delivered by Judge Davis on July 24, 1934, is reported in 72 F. (2d) 509.

STATUTES INVOLVED.

The Federal statute involved in this proceeding and referred to in the courts below is Section 24 of the Judicial Code, as amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091, 28 USCA Sec. 41 (1), and is as follows:

> "The district courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000, and * * * is between citizens of different states."

The Pennsylvania statute involved in this proceeding is "The Banking Act 1923", of June 15, 1923, P. L. 809, as amended by the Act of May 5, 1927, P. L. 762, the Act of May 28, 1931, P. L. 193, the Act of June 12, 1931, P. L. 563, and the Act of May 20, 1932, P. L. (Special Session) 7, 7 PS Sec. 1, et seq. The relevant portions of this act are printed in the Appendix to this brief, beginning at page 60.

JURISDICTION.

The rules of this Court have been complied with.

A statement as to jurisdiction is a part of the brief in support of the petition for certiorari, which was printed and filed with this Court.

STATEMENT OF THE CASE.

This is an appeal from the order of the Circuit Court of Appeals for the Third Circuit affirming a decree of the District Court for the Eastern District of Pennsylvania.

The decree of the district court denied the Commonwealth of Pennsylvania leave to intervene and refused an order directing receivers of Mortgage Building and Loan Association appointed by Judge Welsh of the district court to deliver over to the Secretary of Banking of the Commonwealth all assets and records of the association.

On appeal to the Circuit Court of Appeals for the Third Circuit that court on July 24, 1934 affirmed the decree of the District Court.

The appellant filed its petition for a writ of certiorari on September 21, 1934. Appellees filed an answer opposing the allowance of the writ. The writ was granted on October 22, 1934.

Mortgage Building and Loan Association was chartered by the Governor of Pennsylvania on April 7, 1931. It was a merger of seven former building and loan associations (R. 7, 9). Its assets aggregated three million dollars ($3,000,000).

All Pennsylvania building and loan associations transact business under the supervision of the State Department of Banking (R. 20).

Following an examination of the affairs of Mortgage Building and Loan Association by the Department of Banking, the Secretary of Banking summoned the officers and directors of the association to a hearing before the Attorney General of the Commonwealth. The hearing was held on June 5, 1931. The association was found to be in an unsafe and unsound condition, and was ordered by the Secretary of Banking thereafter to conduct its affairs in a prescribed manner and on a restricted basis in order to safeguard the interests of its creditors and shareholders (R. 20, 21).

The association complied with the order of the Secretary of Banking. Its officers kept in communication with him and reported to him from time to time the condition of the association (R. 22).

On or about October 28, 1932, the Secretary of Banking instructed the association's officers to prepare and submit to him a statement of its condition (R. 22).

On December 6, 1932, upon submission of this statement, it became evident that the association was insolvent. Thereupon a further hearing was held by the Secretary of Banking at which the association's officers were instructed to liquidate the association, (R. 22). They were ordered specifically to:

1. Accept no more dues on account of shares of stock:

2. Return segregated dues to stockholders immediately:

3. Credit payments by the borrowers on account of the principal of the obligations, after deducting legal interest; and

4. Pay withdrawals pro rata to all stockholders after payment of preferred claims.

On February 8, 1933, three of defendant's officers called upon the Secretary of Banking and informed him that in their opinion the best interests of the creditors and shareholders of the association would be subserved if he were to take it into possession. These officers were Joseph H. Sundheim, Esquire, Solicitor, John G. Williams, Real Estate Officer, and Alfred B. Post, Secretary. They sought assurances from the Secretary of Banking that he would employ them in certain capacities to liquidate the affairs of the association after taking it into possession. The Secretary refused to give such assurances, but advised the officers that he would act promptly after consultation with the Attorney General (R. 23).

On February 9, 1933, complainant in this proceeding, a shareholder resident in New York, filed his bill in equity (R. 7). The bill prayed for the appointment of receivers to "liquidate the business and property and assets of defendant [the association] in such manner as they may deem necessary or proper" (R. 13). Thereupon, without notice of any kind to the association's other shareholders or to its creditors or to the Commonwealth or its Department of Banking, Judge Welsh, of the district court, appointed John G. Williams and Joseph B. Simon temporary receivers.

Mr. Williams had been real estate officer of the association (R. 23, 24).

On February 10, 1933, H. H. Eshbach, Chief of the Building and Loan Bureau of the Department of Banking, and Deputy Attorney General Harold D. Saylor of the Commonwealth of Pennsylvania, having read in the Philadelphia newspapers of the court's action, attended a meeting in Judge Welsh's chambers, at which the temporary receivers, their counsel, and officers of the association were present. In the name of the Commonwealth, its representatives requested the court not to make permanent the appointment of receivers, but to permit the Secretary of Banking to take possession of the association, and to liquidate its affairs as contemplated by Pennsylvania law (R. 23, 24).

The court did not accede to this request.

The association's officers thereupon filed a consent answer which had been authorized at a meeting of the directors held the previous evening (R. 15-16). Forthwith the court made permanent the appointment of receivers for the association. The decree of the court empowers the receivers to do all things necessary to effect the liquidation of the association (R. 16).

On February 14, 1933, pursuant to the provisions of Pennsylvania law, the Secretary of Banking summoned the association's officers and directors to, and gave the receivers notice of, a hearing to show cause why possession should not be taken of the association's business and property because it was insolvent,

in an unsafe and unsound condition, and in the hands of receivers. At the hearing, which the receivers did not attend, the officers and directors admitted that the association was insolvent, in an unsafe and unsound condition, and in the hands of receivers. Thereupon the Attorney General gave to the Secretary of Banking his approval and consent to take possesssion of the association's business and property (R. 25).

On February 17, 1933, the Secretary of Banking filed a formal certificate in his office at Harrisburg, taking legal possession of the association; and on the same day he filed a certified copy of the certificate with Court of Common Pleas No. 5, Philadelphia County, as of December Term, 1932, No. 12603 (R. 25).

On February 20, 1933, the district court appointed Charles Denby, Jr., as a third receiver (R. 19).

On March 1, 1933, in accordance with Pennsylvania law, the Secretary of Banking made formal demand upon the receivers to deliver over to him as their successor, all books, papers, and property of defendant association. The receivers refused to do so (R. 25, 26).

On or about March 17, 1933, the Commonwealth of Pennsylvania filed its petition with the district court asking for leave to intervene in the equity proceedings and for an order on the receivers to surrender the association's assets to the Secretary of Banking (R. 20). The receivers filed an answer to this petition (R. 55).

On May 8, 1933, argument on petition and answer was heard by Judge Welsh who on or about June 17, 1933, filed his opinion, holding that the Commonwealth's petition must be dismissed (R. 44). On June 23, 1933, the court entered its decree dismissing the petition (R. 58).

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Third Circuit erred in that it affirmed the decree of the District Court for the Eastern District of Pennsylvania, depriving the Commonwealth of Pennsylvania of the right to intervene as a party to the proceeding entitled "EDWIN B. ELSON v. MORTGAGE BUILDING AND LOAN ASSOCIATION, No. 7535, December Term 1932," and refusing to direct John G. Williams, Joseph B. Simon and Charles Denby, Jr., Receivers of Mortgage Building and Loan Association, to deliver over to the Secretary of Banking of the Commonwealth all assets and records of Mortgage Building and Loan Association.

2. The Circuit Court of Appeals for the Third Circuit erred in entering the following order on July 24, 1934:

> "This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.
>
> "On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of June 23, 1933, of the said District Court in this cause be, and the same is hereby affirmed, with costs." (R. 80).

QUESTIONS PRESENTED.

1. Has a Federal court jurisdiction on a shareholder's bill to appoint receivers to liquidate a quasi-public corporation,—a building and loan association,—when the State law provides a complete system for the organization, regulation, supervision and liquidation of such corporations, and does not permit a shareholder to maintain a suit in the State courts for the appointment of any person as receiver to liquidate their affairs, other than the State administrative official who supervises and regulates such corporations?

2. If a Federal court has such jurisdiction, was the appointment of permanent receivers upon a consent answer in this case an abuse of discretion?

3. Has a sovereign state such an interest in such a receivership proceeding in a Federal court as to entitle it to intervene as a party?

ARGUMENT.

Summary

A member or shareholder of a quasi-public corporation,—a bank, an insurance company, or a building and loan association,—is bound by the provisions of the State law governing the organization, regulation, supervision and liquidation of such corporation.

If the State law provides for liquidation exclusively through the State supervisory official, the member or shareholder must be regarded in law as having accepted that provision as a part of his contract.

Under such circumstances the member or stockholder has no standing to maintain a bill in equity in a Federal court praying the appointment of receivers to liquidate the corporation. He cannot have a controversy with the corporation on this subject; and even though he be a citizen of another state, there is no controversy between citizens of different states.

Diversity of citizenship is not of itself a controversy; and unless there is a controversy, diversity of citizenship does not confer jurisdiction on the Federal courts.

But even if jurisdiction exists, the court should have refused the appointment of receivers in this case because

1. The consent answer by the officers of the association, under the facts here presented, indicated a collusive effort to defeat the State policy of having building and loan associations liquidated exclusively by the Secretary of Banking;

2. Prior to the filing of the bill, the State Secretary of Banking had taken charge of the affairs of this association and had placed its operations on a restricted and liquidating basis, pending his determination of the queston whether he himself should liquidate its affairs;

3. There was no charge of fraud, mismanagement or improper conduct of any kind on the part of the Secretary of Banking in supervising this association; and

4. The Federal courts, as a matter of comity, should not lend themselves to the subversion of a State's policy in the management and liquidation of quasi-public corporations upon the mere assertion of diversity of citizenship and the necessity for liquidation.

And even if the court did not abuse its discretion in appointing receivers, the Commonwealth should have been permitted to intervene and the Court should have ordered the assets turned over to the Secretary of Banking. To this extent, at the very least, the Federal courts should sustain a State's policy in assuring stockholders of its quasi-public corporations, that liquidation, if it becomes necessary, will be in charge of the State's administrative officer charged with the

duty of supervising, regulating, and liquidating such corporations.

I.

The District Court Did Not Have Jurisdiction to Appoint Receivers to Liquidate the Building and Loan Association.

Congress has given expression to the policy that stockholders and creditors of building and loan associations shall not be subjected to the liquidation of their affairs by Federal courts at the instance of disgruntled stockholders.

Quasi-public corporations, such as insurance companies, banks, trust companies, and building and loan associations, are not subject to the bankruptcy laws (Act of April 11, 1932, c. 38, 47 Stat. 47). A district court cannot appoint receivers in bankruptcy for a building and loan association and thereafter wind up its affairs. We submit that a district court may not effect the same result by means of an equity receivership proceeding.

The proceedings here instituted by bill in equity are tantamount to bankruptcy proceedings. The bill alleged and the defendant admitted insolvency. The prayer of the bill is that the receivers liquidate the association.

This is not a receivership instituted for the purpose of continuing the business. It is not a "nursing receivership." It is in effect a bankruptcy proceeding.

In his bill, the complainant asked for the appointment of receivers to "liquidate the business and property and assets of defendant" (R. 13).

There is no legislative authority in a district court to appoint a receiver to liquidate a quasi-public corporation of Pennsylvania.

The Act of Congress (R. S. Sections 563, 629; 28 USCA Section 41, (1)) provides that:

> "The district courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000, and * * * is between citizens of different States * * *."

Under the system established by Pennsylvania law there cannot be a justiciable controversy between a shareholder and a bank or building and loan association involving the appointment of receivers to liquidate the institution. A citizen of Pennsylvania cannot by bill in equity in a Pennsylvania court secure the appointment of receivers to liquidate a Pennsylvania bank or building and loan association. If such a bill were filed only the Secretary could be made receiver. (Sec. 22 of the Act of 1923). There would be no justiciable controversy to support a bill seeking the appointment of any other person.

Therefore, if the district courts of the United States have jurisdiction in cases such as that now before the

court, a citizen of another state would have rights superior to those of citizens of Pennsylvania.

Diversity of citizenship must, in such event, be held to **create** a controversy, which, but for diversity of citizenship, could not exist.

To state the matter differently, the court would not be taking jurisdiction of controversies between citizens of different states but would be creating controversies between such citizens.

For the purposes of this case, it is not necessary to determine whether receivers can ever be appointed for banks or building and loan associations. Admitting for the sake of the argument, that allegations of fraud or mismanagement or maladministration might warrant the appointment of receivers, nevertheless receivers cannot be appointed for such institutions for the express purpose of liquidating them.

Under the law of Pennsylvania, if receivers are appointed for any reason, the Secretary of Banking may take possession of the institution **because receivers have been appointed.**

And the law expressly requires that upon taking possession, the Secretary of Banking "shall supersede any receiver previously appointed by any court."

In addition to the requirement that there be a controversy, the Judicial Code, as quoted above, confers jurisdiction only over suits "of a civil nature, at com-

mon law or in equity." This provision has been construed as conferring jurisdiction in equity only where it can be supported by the principles of the High Court of Chancery in England existing at the time of the adoption of our Constitution.

In LORING v. MARSH et al., Fed. Cas. No. 8515 (C. C., Dist. Mass., 1865) Judge Clifford said, at 15 Fed. Cas. 905, 914:

> "* * * The courts of the United States cannot exercise any equity powers, except such as are conferred by an act of congress, and those judicial powers which the high court of chancery in England under its judicial capacity, as a court of equity, possessed and exercised at the time of the formation of the constitution of the United States. * * * The supreme court hold that the prerogative power belonging to the sovereign, has not been delegated to the federal government, but remains in the several states, and is to be exercised according to the laws and usages prevailing in the several states * * *"

We have been unable to find any case in which the High Court of Chancery assumed jurisdiction to liquidate a quasi-public corporation.

That being the case, the section of the Judicial Code to which we have referred cannot be construed as conferring upon district courts jurisdiction in equity to liquidate quasi-public corporations and especially quasi-public corporations of sovereignties other than the United States Government. And there is no other Federal statute which could be construed to effect that result.

It is, of course, true that state legislation cannot limit or control the jurisdiction of the Federal courts in cases in which they have heretofore been accustomed to exercise jurisdiction. But state laws may in effect bar an individual from resort to a Federal court by denying him a right of action against a quasi-public institution of which he is a member or shareholder. The Federal courts have recognized this distinction.

In McGarry v. Lentz, 13 F. (2d) 51 (1926), the Circuit Court of Appeals for the Sixth Circuit affirmed the District Court in its refusal to appoint receivers for an Ohio fraternal benefit society on application of several of its members. The Ohio General Code contemplated the complete regulation of domestic fraternal benefit societies and insurance companies by state officers. The court held that this precluded any member of a society organized under such laws from resorting to a Federal court for relief not contemplated by the state statute. Judge Hickenlooper said, at page 52:

> "* * * Obviously, no state Legislature can regulate, limit, or control the jurisdiction of the federal courts, nor can the laws of any state preclude resort to the federal courts, nor confer exclusive jurisdiction upon a designated state court, in a class of cases of which the federal courts of equity have theretofore been accustomed to assume jurisdiction. * * *"

But at page 53:

> "* * * While the question is sometimes loosely referred to as one involving the jurisdiction of the court over the subject-matter of the litigation, the

purpose, scope, and effect of section 9487 of the General Code of Ohio, and similar provisions in other states, are those of the limitation of the rights of members and policy holders, rather than a restriction upon the jurisdiction of courts of equity.

"In the present case the very contract, which created whatever rights the complainants may have, limited and defined those rights, so as to exclude the remedy now asserted. The question, therefore, is not whether the complainants are by statute precluded from asserting in this court a right given them by law, but rather whether the right was ever existent. The complainants have no rights here which do not originate under and are not founded upon their contracts of membership and policies of insurance in the American Insurance Union. * * *"

Likewise, in COOK v. ILLINOIS BANKERS' LIFE ASS'N, 46 F. (2d) 782 (1931), the Circuit Court of Appeals for the Second Circuit upheld the District Court in dismissing a bill of complaint brought by five policyholders of an Illinois life insurance company on the ground that the complainants were without right under state law to maintain an action for an injunction and for the appointment of a receiver. The court held, citing MCGARRY v. LENTZ and other cases, that the laws of Illinois regulating its insurance companies "are a part of the charter of both the association and the company, and their enforcement is a property right of every member of the association and a charter right of the association. * * *. These provisions are valid limitations and safeguards, binding upon the corpora-

tion and its members, and will be enforced by the federal courts," (page 783).

See also HAYNES v. FRATERNAL AID UNION, 34 F. (2d) 305 (1929), where a similar statute was held by the District Court for Kansas to deny a member of a Kansas fraternal society the right to resort to a Federal court for an injunction or a receiver. By becoming members of the society the complainants "contracted away their rights" to such remedies.

RELF v. RUNDLE, 103 U. S. 222 (1881), has long been authority for the proposition that where an insurance company is dissolved under the laws of the state of its creation, the supervising official of the state becomes vested with all of its property and is actually the successor to the corporation itself.

The reasoning of the Court in that case is significant in the instant case. In holding that Relf, the Superintendent of the Insurance Department of Missouri, had a right to bring a suit in the courts of another state for the recovery of property belonging to the company, Mr. Chief Justice Waite said (page 225):

> "After the decree of dissolution the Life Association Company had no longer any corporate existence, and the temporary agency and receivership of Frost was ended when the property of the Corporation was transferred to Relf and he became under the law entitled to the possession.
>
> "Relf is not an officer of the Missouri state court, but the person designated by law to take the property of any dissolved life insurance cor-

poration of that State, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. **The law which clothed him with this trust was, in legal effect, part of the charter of the Corporation.** He was the statutory successor of the Corporation for the purpose of winding up its affairs. * * * He is an officer of the State, and as such represents the State in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was in fact, the Corporation itself for all the purposes of winding up its affairs.

"We are aware that, except by virtue of some statutory authority, an administrator appointed in one State cannot generally sue in another, and, that a receiver appointed by a state court has no extra-territorial power, but a corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give. * * * Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution.

> "By the charter of this Corporation, if a dissolution was decreed, its property passed by operation of law to the Superintendent of the Insurance Department of the State, and he was charged with the duty of winding up its affairs. **Every policy holder and creditor in Louisiana is charged with notice of this charter right which all interested in the affairs of the Corporation can insist shall be regarded.** * * *"

In the present case it is the Commonwealth's contention that the complainant in the district court, a stockholder of Mortgage Building and Loan Association, whether or not he resided beyond the confines of the Commonwealth, is bound by the laws under which the association of which he is a member was created and regulated. By the provisions of those laws the association could be liquidated only by the Secretary of Banking. The effect of the provision designating the Secretary as successor to a receiver appointed by any court was to preclude the complainant from resorting to the district court for the appointment of a receiver to liquidate the affairs of the building and loan association.

There was no justiciable controversy brought to the District Court by the bill in equity filed there.

II.

Even if Jurisdiction Existed It Was An Abuse of Discretion to Appoint Receivers In This Case.

A reading of the portions of The Banking Act of 1923, quoted at pages 25 and 42 and printed in the Appendix to this brief, renders it apparent that the

Commonwealth of Pennsylvania has provided a complete system for the incorporation, supervision, and liquidation of building and loan associations.

Under Section 21 the Secretary of Banking, under certain conditions, may take possession of the business and property of a building and loan association. Subsequent sections prescribe his powers and duties after he has taken possession.

In this case, although the Secretary of Banking had not actually taken possession of the building and loan association prior to the filing of the bill of complaint, he had taken the steps described in our Statement of the Case, to safeguard the assets of the association, and to protect its stockholders and creditors. Section 20 of The Banking Act of 1923 gave him full authority to take these steps.

Beginning on June 5, 1931, when the Secretary found the association to be in an unsafe and unsound condition and continuing thereafter until the bill in equity was filed in these proceedings, he never ceased to exercise control over the association as authorized by Pennsylvania law. His orders compelled a specific course of action.

The association's officers acknowledged the propriety of the restrictions imposed by the Secretary of Banking. They recognized his authority and conducted the association's business accordingly. What they did was binding upon the shareholders.

There is no charge in the bill of complaint that the Secretary of Banking, in permitting the association to operate on a restricted basis, even after it was found to be insolvent, was guilty of neglect or delay in performing his duty. What was being done benefited all stockholders and creditors. Rather than take possession of the association and liquidate it, as the law permitted him to do, the Secretary elected to permit the association to operate upon a restricted basis, until such time as he determined that the best interests of the stockholders and creditors would be served by his taking possession of the association and liquidating it. During this time the association was being slowly liquidated at a minimum of expense and without wastage of assets. But it was always under the supervision and control and subject to the directions of the Secretary.

Under these circumstances, we submit that the district court should not have entertained a shareholder's bill designed to unseat the state officer. The court should have sustained Pennsylvania's statutory method of liquidation.

In STATE OF OHIO EX REL. BETTMAN, ATTORNEY GENERAL, v. COURT OF COMMON PLEAS OF FRANKLIN COUNTY ET AL., 178 N. E. 258 (1931), the Supreme Court of Ohio restrained by prohibition the appointment by an inferior court of a receiver for a building and loan association. The complainant, a creditor, alleged that the association was insolvent and requested the appointment of a receiver. The Attorney General of the State alleged that for some time prior to the suit the Superintendent of Building and Loan Associations of

Ohio had been examining the association to ascertain its true condition and determine the course to be pursued by him under the law, and that the sole purpose of the complainant and her counsel in filing the bill was to deprive the superintendent of jurisdiction and procure the liquidation of the association by receivers.

The Supreme Court held that the court of common pleas had no authority to appoint a receiver and that the statutory method of dissolution and liquidation of building and loan associations was adequate, complete, and exclusive. The language of Matthias, J., at page 261, is particularly pertinent in this case. He said:

> "These facts are uncontroverted, and there being no charge of failure, neglect, or delay of the superintendent of building and loan associations, or of the attorney general, in the performance of their duties prescribed by law, the presumption, of course, obtains that they have been and will continue to be diligent in the performance of all the duties, and faithful in meeting all the responsibilities of their respective offices relative to the affairs of said company."

In the present case, the Secretary of Banking, having a complete knowledge of conditions obtaining in the building and loan association field because of his close contact with and supervision over the thousands of such associations in Pennsylvania, was the proper person, in fact and in law, to determine what was for the best interests of the association and its members.

In order to protect the stockholders and creditors of building and loan associations and to prevent a col-

lapse of the entire field, the Secretary of Banking in the case of hundreds of other associations, had followed the procedure he had taken in the present instance.

While acting faithfully according to the law of Pennsylvania, the Secretary was challenged to take possession of the Mortgage Building and Loan Association and appoint its officers his agents for liquidation, or lose control of it to a Federal receiver. Upon the Secretary's refusal to surrender to this improper demand, the bill was filed forthwith.

The haste of the court below was so great that the Secretary could not take possession before permanent receivers were appointed.

The receivers' counsel argued below that the Commonwealth did not exercise diligence and did not promptly take possession of the association, although it had power so to do immediately. That is not true.

Until the threat of a Federal receivership was made, there was no occasion for the Secretary of Banking to take possession of the defendant association. He believed that he was best serving the stockholders and creditors by permitting it to follow the course which he ordered.

When the threat was made, a hearing, after notice, and the Attorney General's consent to take possession, were necessary preliminaries to the taking of possession.

Section 21 of The Banking Act, as amended, provides that the Secretary may take possession of an association if found to be in an unsafe or unsound condition or in the hands of a receiver, etc., "after hearing had upon notice given, with the approval and consent of the Attorney General".

Counsel for the receivers, arguing that the Department of Banking could have taken possession the day before the Federal receivers were appointed, referred in the courts below to the phraseology of paragraph III, of Section 21 of the Banking Act, which reads:

> "Is in an unsafe or unsound condition to continue business: Provided, in such case, That the Secretary may forthwith, without such hearing and consent of the Attorney General, take possession of the business and property **of any such corporation or person receiving moneys on deposit,** when and if, in his opinion the protection of depositors and the public requires such peremptory action".

Obviously a building and loan association is not a corporation receiving moneys on deposit. The peremptory action authorized by paragraph III can be taken only in the case of a bank or trust company, and not in the case of a building and loan association.

The Commonwealth and its Department of Banking were helpless to prevent the nonresident stockholder from presenting his bill in equity to the court below; but that court could reasonably have required notice to be given to the Secretary of Banking before taking final action. Surely a sovereign state and its depart-

ments of government are entitled to that consideration in the courts of the United States.

The District Court, in its opinion, stated that the action of the Secretary taken in 1931, which placed the association on a restricted basis, was, at most, a mere admonition and "did not even rise to the dignity of a restraining order". The court then says that even had it reached such dignity, the Secretary's action was not equivalent to the commencement of an action for the appointment of a receiver.

The Commonwealth does not contend that it was. The Commonwealth does contend that in view of the situation existing when the bill was filed,—and it must have been apparent to the court as it is evident from a reading of the bill,—the court should not have acted as it did.

The question is: Should a Federal court even if it has jurisdiction, ignore the public policy of a state merely because there is a diversity of citizenship and the sum of three thousand dollars ($3,000) is involved?

There is abundant support for a negative answer.

The complainant asked the court to appoint receivers to liquidate his association. The court acted instantly, conceiving it to be its duty to do so, irrespective of the fact that thousands of other shareholders as well as the State Department of Banking knew nothing of the application.

In so doing the court abused its power.

The possession of jurisdiction is not the same thing as its exercise.

As Section 7669 of Fletcher's Cyclopedia of Corporations expresses it:

> "The distinction between 'jurisdiction' to appoint a receiver and whether the power, if it exists, shall be exercised, must always be kept in mind. Jurisdiction of a court of equity to appoint a receiver is one thing, and whether the court will exercise its jurisdiction is an entirely different matter. While courts hesitate to appoint a receiver, especially when the corporation is solvent, this does not mean that there is want of jurisdiction to appoint a receiver, it being well said that 'judicial hesitancy does not mean judicial atrophy or paralysis.'"

And, again in Section 7697:

> "* * * The power of appointment [of receivers] is a delicate one, and to be exercised with great circumspection. Indeed, the courts have held repeatedly that **the power to appoint a receiver should be exercised with great care and the utmost caution and only in case of an emergency** * * * or * * * 'extreme necessity,' * * * and more especially is this true where the corporation is solvent, or the defendant corporation is a bank. * * * 'A receivership is not a panacea for all business ills. The remedy may be worse than the disease. * * * 'A receivership is the most drastic remedy and the most expensive luxury known to the realm of the law.' * * *" Citing Furrer v. Nebraska Building and Investment Company, 189 N. W. 359 [Neb.]

This language applies with particular force to building and loan associations. This is especially so in view of the fact that the legislatures of many states have enacted laws giving to statutory officers rather than to the courts, the duty to liquidate these associations. The legislatures evidently had in mind the avoidance of the well-known abuses which have become so costly to creditors and stockholders in receiverships of ordinary corporations.

In his Article on "THE ABUSES OF RECEIVERSHIPS," in XIX Yale Law Journal 275 (1910), Judge Jacob Trieber of the United States District Court in Arkansas, said:

> "The appointment of a receiver and the granting of a temporary injunction, like the granting of specific performance of contracts, is not a matter of absolute right, but is within the sound discretion of the court, guided by the established principles, rules and practices in equity. One of the well established rules is that courts of equity will not grant any interlocutory relief if the injury caused the defendants by reason thereof will prove very great, while the benefits to the party applying therefor will be but small compared with the injury inflicted upon the defendant. Still, in spite of these well settled equitable principles, it is not unusual for appointments of receivers to be made upon the most flimsy allegations, and sometimes even without notice to the parties directly affected thereby. * * *"

Experience shows this to be true.

There is a real and extensive public interest involved in the state supervision and regulation of banks

and building and loan associations. Judges should hesitate a long while before applying to such institutions the extraordinary remedy of receivership.

In ULMER v. FALMOUTH, 93 Me. 302, 45 A. 32 (1899), the Supreme Court of Maine said (page 34):

> "'It is to be observed that these institutions possess a public character, and it is for the interest of the public, not only that they shall be subjected to judicial investigation when they ought to be, but also that they shall not be so subjected when they ought not to be. Unusual means are placed in the hands of the bank examiner to ascertain their condition, and it cannot be presumed that he will fail to act in a proper case. If one shareholder may maintain a bill, so may every other. There is no limit. To subject loan and building associations to vexatious, harassing and expensive litigation caused by the suits of possibly multitudinous shareholders who may be dissatisfied, with or without reason, would greatly impair their usefulness, if not imperil their existence.'"

The courts should not exercise their power to appoint receivers where the consequences will not be helpful to the parties most interested and will be fatal to the corporation itself.

In BANK OF BAY BISCAYNE ET AL., v. HANKINS ET AL., 42 Fed. (2d) 209, (C. C. A. 5th Cir. 1930), the District Court appointed a receiver to control the assets of an insolvent state bank, in place of the state comptroller of Florida acting under statutory authority. The appellate court reversed the district court's action. It

remanded the case, with directions to dismiss the bill of complaint, "The mandate to issue immediately."

The court said, at page 210:

> Regardless of the terms used, it is apparent that the order in effect appoints a receiver to control the assets of the failed bank, and enjoins the comptroller from carrying on the liquidation of the institution under provisions of the laws of Florida. **A bank organized under the laws of a state is a quasi-public institution, and, whenever the laws of the state provide for supervision and control of the affairs of the bank by an authorized official, and also for the ultimate liquidation and distribution of its assets under his direction, in the event of its insolvency, it is a matter of grave consequence for any court to interfere,** and that should be done only in a perfectly clear case. It does not appear from the record that such a case is presented here. The laws of Florida provide an orderly method of liquidating the affairs of an insolvent state bank, in substantially the same manner that federal statutes provide for the liquidation of an insolvent national bank. * * * It is usually a matter of discretion to issue an injunction and appoint a receiver, but the exercise of jurisdiction and the entering of the order appealed from in this case appear to us to be unwarranted."

In STREET'S FEDERAL EQUITY PRACTICE, Vol. 3, Section 2528, it is said:

> "* * * the right of a federal court to appoint a receiver may sometimes be materially affected by state statutes. For instance, if a state statute creates a subtantive right inconsistent with the right to have a receiver appointed, a federal court

will not appoint a receiver, though upon the general principles governing its own practice a receiver would be appointed."

Not only does the Pennsylvania statute negative the liquidation of building and loan associations through a receivership but it also creates a positive right on the part of shareholders to have the Secretary of Banking substituted if a receiver is appointed. This right should, we submit, be recognized by the Federal courts.

And the right conferred by the Pennsylvania law is not merely for the benefit of the members of the particular association. It is intended to benefit the people of the Commonwealth generally. It is a matter of real public importance that the affairs of building and loan associations, banks and trust companies be liquidated,—when liquidation becomes necessary,—in an orderly and economical manner. And those who deal with such corporations have a right to rely upon the sanctity of the law creating and regulating them.

In MITCHELL v. LAY ET AL., 48 Fed. (2d) 79 (1931), it was held that the Insurance Commissioner of California could not be ordered by a Federal court to deliver over to its receiver funds placed in the custody of the state for the protection of the insolvent insurance company's creditors therein. The District Court judge had issued such an order, but on appeal he was reversed.

Judge Wilbur said at page 84:

"It will be observed that this injunction pro-

> hibits the insurance commissioner from performing the duties imposed upon him by a state statute * * * which provide for the liquidation of insolvent insurance companies which have been engaged in business in the state of California. The constitutionality of this state statute is not disputed. The order appealed from directs that the appellant insurance commissioner violate his official duty under such statute by turning over to the receiver of the federal court a fund that was in the custody of the state through its officers for the protection of creditors of the insolvent insurance company before this action was begun. And these orders are made notwithstanding that there is no claim that the insurance commissioner has neglected his duty, but solely on the ground that he is endeavoring to perform his duty as defined in the state statute. The mere statement of this situation is sufficient to show the impropriety of the order of the court. * * *"

A petition for writ of certiorari to the Supreme Court of the United States was denied. (283 U. S. 864, 75 L. Ed. 1469 [1931]).

In Amos, Comptroller of State of Florida v. Trust Company of Florida et al., 54 Fed. (2d) 286 (C. C. A. 5th Cir. 1931), the District Court attempted to take over a large part of a trust company's assets by a special receivership. It enjoined the state comptroller from exercising the functions imposed upon him by state law. The appellate court held such action by a District Court improper and unwarranted. The state administrative officer was compared to a liquidator appointed under the national banking act and was

held to be not a court officer, but a representative of the state.

In his decision, Circuit Judge Sibley followed the decisions of the Florida courts in STATE OF FLORIDA EX REL. DADE COUNTY SECURITY CO. v. BARNS, 128 So. 860 (1930); BANK OF BAY BISCAYNE v. HANKINS, supra; and STATE OF FLORIDA v. CIRCUIT COURT, 135 So. 866 (1931).

A petition for a writ of certiorari was denied by this Court (285 U. S. 559, 76 L. Ed. 947 [1932]).

This Court appears to have set its seal of approval on the policy of non-interference by equity courts with state systems of supervision, control and liquidation of quasi-public institutions.

This Court recognizes that "a proper respect and deference on the part of the Federal agencies of government toward those of the state compel the assumption that the state agency is able and willing to perform its statutory duties."

This is true even where a quasi-public corporation is not involved. How much more so where the corporation involved is a building and loan association?

In the most recent case where a receivership was obtained by the filing of a consent decree, this Court gave warning against the abuse of the practice of appointing Federal receivers upon a consent answer, where the application is predicated on diversity of citizenship.

In SHAPIRO v. WILGUS ET AL., RECEIVERS, 287 U. S. 348, 77 L. Ed. 149 (1932), Mr. Justice Cardozo, said at page 152:

> "We have given warning more than once, however, that the remedy in such circumstances is not to be granted loosely, but is to be watched with jealous eyes. * * * Never is such a remedy available when it is a mere weapon of coercion, a means for the frustration of the public policy of the state or the locality. * * *"

The filing of the bill and consent answer in this proceeding within twenty-four hours of the application for receivership was an effort to frustrate the public policy of Pennsylvania. The court below became a party to an effort to deprive the Secretary of Banking and the state court of their jurisdiction over the affairs of the association. The undenied averments of the Commonwealth's petition show the reason for the effort made to achieve this end.

Before closing our argument on this point, we feel that we should call the Court's attention to PORT NEWARK NAT. BANK OF NEWARK v. WALDRON, 46 Fed. (2d) 296 (C. C. A. 3rd Cir. 1930). In that case a district court appointed a receiver to take charge of the affairs of a national bank. The receiver appointed by the Comptroller of the Currency under the provisions of the United States statutes appealed from the decree making this appointment.

The Comptroller of the Currency holds a position with respect to national banks similar to that held by the Secretary of Banking with respect to Pennsyl-

vania banks, trust companies and building and loan associations. In the PORT NEWARK CASE the Comptroller had been supervising the institution with a view to liquidation and was conferring with the bank's officers on a plan that might make such course unnecessary. On the very day of the conference a stockholder presented to the district court a bill praying for a receivership. The court granted a rule to show cause why receivers should not be appointed. The following morning the Comptroller appointed a liquidator under the authority of the Revised Statutes of the United States (12 U. S. C. A. Section 191), providing that "Whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs * * * appoint a receiver who shall proceed to close up such association."

The circuit court held that (page 279):

> "* * * the authorities are clear that the appointment of receivers by the Comptroller is part of a complete federal system looking to the control of national banks, and that such receivers are not like a receiver appointed by a court, but are officers of the United States, and their possession of the bank is the possession of the United States. * * *"

The similarity of the situation to that of the case at bar is striking. The Secretary of Banking is not like a receiver appointed by a court, although he is given by statute the powers of such a receiver. He holds and exercises those powers by virtue of his statutory office. Possession by him of a building and loan association

or bank is possession by the Commonwealth of Pennsylvania.

Judge Buffington's language at page 298 of the PORT NEWARK CASE, states our situation precisely:

> "We pass over the omission to give notice to the bank of the filing of the bill and the application for a receiver; of the failure to give bond either when the injunctive ex parte restraining order of August 7th was entered, or, indeed, when the final injunction order of August 13th was made; of the effect of the filing of the bill in precipitating the closing of the bank and making impossible of performance the acceptance of Mr. Rippel's offer on behalf of the Merchants' & Newark Trust Company of taking over the bank and preventing its closing; and confine ourselves solely to the question whether the Comptroller's receiver was lawfully ousted from his possession. We are of opinion he was not. **This is not a conflict between two courts of co-ordinate jurisdiction, but is one between the judicial and the executive arm of the sovereignty.** In our view, the threatening status of this bank on August 7th and its efforts to prevent its failure necessitated the supervision and 'dominion' of the Comptroller, and, when that duty was begun by the bank examiner, the Comptroller had 'dominion' over the bank's affairs, and so continued until the efforts to prevent closing the bank were defeated by the filing of this bill. When this happened, it became the duty of the Comptroller, who, as his order stated, 'had information on file in this bureau that the bank is insolvent,' to appoint a receiver and close the bank. The wisdom of his so doing prevented a run and a depletion of the bank's assets. For it will be observed that the court's order of August 7th was

not to close the bank, but to except from its order 'the ordinary course of business of the bank'—a situation that would have precipitated a run upon it and a depletion of its assets from August 7th until August 13th, when the court's order appointing a receiver was entered. * * *"

Then KORLBY v. SPRINGFIELD INST. FOR SAVINGS, 245 U. S. 330, 62 L. Ed. 326 (1917) was cited. There the Supreme Court speaking through Mr. Justice Clarke said (page 333):

"From the earliest days of the administration of the National Banking Act to this case attempts have been made in many forms to give to it a technical construction which would so restrict the powers of the Comptroller as to greatly delay and impede the settlement of the affairs of insolvent banks. But this court has uniformly declined to narrow the act by construction, and has placed a liberal interpretation upon its provisions to promote its plain purpose of expeditiously and justly winding up the affairs and paying the debts of such unfortunate institutions. * * *"

Judge Buffington continued in the PORT NEWARK NATIONAL BANK CASE (page 299):

"* * * Sufficient to say that in the present case we regard the Comptroller at the time this bill was filed as having complete dominion over, and, by his bank examiner, full legal control of, the then and future operations of the bank, and that such situation might ultimately require the appointment of a receiver. Consequently, the court below, when the bill was filed, acquired no jurisdiction to shear the Comptroller of the statutory power to take the further step of appointing a

> receiver in case insolvency existed and the attempted sale fell through. As the order states the comptroller had on file at that time information of the insolvency of the bank, it is clear he had already complied with the statutory provisions of 'on examination of its affairs,' after which he 'may appoint a receiver.'"

In the instant case the Secretary of Banking had complete dominion over the affairs of Mortgage Building and Loan Association at the time the complainant's bill was filed. We do not say that the Court of Common Pleas of Philadelphia County, in which the certified copy of the certificate of possession was filed, had jurisdiction at that time. Nor do we say that such jurisdiction as it obtained upon the filing of such certificate, dated back to a time prior to the filing of the bill in this case. We do say that the Secretary of Banking, having exercised dominion over the association long prior to the application to the district court, had jurisdiction as a statutory officer, with which the district court should not have interfered.

Receivers' counsel and the court below treat this case as if it involved a dispute between two courts. Because the bill in equity was filed on February 8, 1933 and it was not until February 17, 1933 that the Secretary of Banking filed a certified copy of his certificate of possession in the court of common pleas, they argue that the Federal court first took jurisdiction, and merely because of that fact should continue to hold it.

From our standpoint, it is immaterial whether the

District Court obtained jurisdiction before the state court, granting for the moment that the court had jurisdiction.

The question is much more far-reaching than that.

We are urging, that even if the District Court technically had jurisdiction, it ought not to have exercised it.

But in any event it is clear that the District Court, technically was obliged to rely upon the consent answer filed by the officers of the association who secured employment in the receivership, to justify its action in making its appointments permanent. And, we submit, a consent receivership should never be permitted to defeat a state system of regulating, supervising and liquidating its quasi-public institutions such as banks and building and loan associations.

Using language equally as forceful as that which we have quoted from Federal appellate court decisions, the state courts have repeatedly upheld the systems established by state law to supervise and liquidate banks, building and loan associations and insurance companies.

The highest courts of several states have used the writ of prohibition or equivalent remedy to halt any effort of a court of first instance to usurp the powers reserved by statute to administrative officers in such cases.

ABBOTT, COM. OF BANKING, v. MORRIS, Judge, 132 S. E. 372 (S. C. A. W. Va. 1926)

GREEN, SUPERINTENDENT OF BANKS, v. SMITH ET AL., 129 So. 92 (S. Ct. Fla., 1930)

STATE OF FLORIDA EX REL. DADE COUNTY SECURITY CO. ET AL. v. BARNS ET AL., 128 So. 860 (S. Ct. Fla., 1930)

STATE OF FLORIDA EX REL. LANDIS, ATTY. GEN. v. CIRCUIT FOR ELEVENTH JUDICIAL CIRCUIT ET AL., 135 So. 866 (S. Ct. Fla., 1931)

STATE OF FLORIDA EX REL. PORTER ET AL. v. ATKINSON, CIRCUIT JUDGE, ET AL., 146 So. 581 (S. Ct. Fla., 1933)

STATE OF MISSOURI EX REL. MISSOURI STATE LIFE INS. CO. v. HALL, JUDGE, ET AL., 52 S. W. (2d) 174 (S. Ct. Mo., 1932)

STATE OF OHIO EX REL. BETTMAN v. COURT OF COMMON PLEAS OF FRANKLIN COUNTY, 178 N. E. 258 (S. Ct. Ohio, 1931)

UNION SAVINGS AND INVESTMENT CO. v. DISTRICT COURT OF SALT LAKE COUNTY, 140 Pac. 221 (S. Ct. Utah, 1914)

Clearly, the association, existing and functioning only because the Commonwealth of Pennsylvania gave it existence and provided rules for the conduct of its affairs, could not, least of all in a court of equity, nullify the effect of its creator's laws. It could not legally take itself outside the jurisdiction of the state, escape the supervision of the Department of Banking, and ignore orders issued by the Secretary.

The mere fact that a consent answer, authorized by the directors the night before, was submitted to the judge as chancellor, should have served not as an excuse for the appointment of temporary receivers, but as the very reason for refusing such appointment.

The association itself could not violate, with impunity, an order of the Secretary of Banking. Certainly a shareholder, whose interest in the association is that of one of many partners, merely because of residence beyond the borders of the Commonwealth, should not be permitted to set aside the application of Pennsylvania laws and the Pennsylvania system of supervision over associations.

III.

Even if the District Court Had Jurisdiction to Appoint Receivers, it Was Error to Deny the State's Application For Leave to Intervene and to Refuse to Order the Assets Turned Over to The State Secretary of Banking.

Again we call attention to the complete State system for the organization, regulation and liquidation of building and loan associations established by "The Banking Act of 1923", as set forth in the Appendix to this brief.

Under that system, the Secretary of Banking has large discretion even after he takes possession of a building and loan association. He has the right to continue the business or to liquidate its affairs. He may surrender possession to enable the association to

merge with another association. He may sell assets at public or private sale, subject to certain restrictions. He may effect compromises of claims. And he has other powers which, properly exercised, assure to stockholders and creditors the most favorable and least expensive determination of the association's difficulties.

Paragraph IX of Section 21 of the act authorizes the Secretary to take possession of any corporation under his supervision, with the approval and consent of the Attorney General, when such corporation "Is in the hands of a receiver appointed by any court, or in any bankruptcy proceeding, or of an assignee or trustee for creditors appointed by such corporation or person".

Section 22 of the act provides that:

> "From and after the filing of such certified copy in the office of the prothonotary, the Secretary shall supersede any receiver previously appointed by any court for, or any assignee or trustee for creditors appointed by, such corporation or person."

Clearly, the Legislature of Pennsylvania meant to assure stockholders of all building and loan associations that the State itself, acting through one of its principal officers, would assume exclusive charge of all liquidation proceedings.

The State's policy in such matters should not be nullified by the continuance of a court receivership,

after the Secretary of Banking has taken appropriate steps to carry the State's policy into effect.

Comity between the Federal and State governments demands that the Federal authorities do their utmost to effectuate State policy in matters involving these quasi-public corporations.

And generally speaking this has been the attitude of those Circuit Courts of Appeal which have had an opportunity to express themselves upon a question such as the one here presented.

In LYON v. MCKEEFREY, 171 Fed. 384 (C. C. A. 3rd Cir. 1909), a nonresident creditor of a Pennsylvania bank secured the appointment of Federal receivers, who carried on liquidation to the point where creditors were paid. The state banking official sought an order on the receivers to turn over the balance of the assets to him. The district court refused such order, but the Circuit Court of Appeals reversed the court below. It held that the state system for the government of banking institutions and insurance companies is such that a Federal court should not interfere with it.

In the course of his opinion, Judge Gray said (page 392):

> "The defendant corporation was a creature of the laws of Pennsylvania, and by those laws the rules governing its existence were prescribed. The measure of control to be exercised over its own corporations was determinable by the law and policy of the state to which they owed their being.

> By the legislation here in question, the state of Pennsylvania has seen fit to subject such corporations to supervision and administrative control and has ordained the proceedings, partly administrative and partly judicial, by which the life of such corporations may be determined and their affairs wound up and liquidated. The judicial proceeding is not one that may be instituted by private parties, but by the Attorney General of the state, acting on behalf of the commonwealth and in the interest of the public. Such a proceeding is not one of which a United States court can have concurrent jurisdiction. It does not involve a controversy between privates parties, whether citizens of the same state or of different states."

In principle there is absolutely no difference between a case involving an insurance company or a bank, and a case involving a building and loan association.

In O'NEIL v. WELCH, 245 Fed. 261 (C. C. A. 3rd Cir. 1917), the court had for consideration Pennsylvania's right to administer the affairs of its insurance companies through the Insurance Commissioner. The Commissioner, through the Attorney General, proceeded in a state court under the state's statute against Union Casualty Insurance Company of Pennsylvania. Thereafter, a nonresident stockholder filed a bill in the district court alleging insolvency and asking for the appointment of a receiver. The defendant company filed a consent answer. One day before the proceeding in the state court came to a head, the district court appointed a receiver. The Attorney General thereupon filed a petition in that

court to vacate the appointment. The district court dismissed the petition but on appeal, was reversed.

The receivers in the case at bar take comfort in certain language used by Judge Woolley, indicating that the jurisdiction of the state court was sustained because that court had acted first. But the Court did recognize the rule that state systems of control over quasi-public institutions must be respected. At page 267 Judge Woolley said:

> "The state engaged in this undertaking primarily for the protection of the public. Being for the public, its action is a governmental function. When in its exercise it becomes necessary to protect the public from insolvent or improperly conducted insurance companies, the state pursues a remedy prescribed by the same law that conferred the corporation's rights and defined the state's duties. Given briefly, the Insurance Commissioner, acting through the Attorney General, files in a State court a suggestion of the corporation's insolvency or unlawful conduct. In this way the State acts and in this way the State begins suit. Upon the State's suggestion the court starts a judicial inquiry by directing to the Insurance Company a rule to show cause why the Insurance Commissioner should not take possession of its property, **and at the same time** (that is at the very beginning of the suit) the court, if it wishes, lays its hand upon the company's property, and by a restraining order holds it within its control pending the inquiry.
>
> "The jurisdiction of the State court thus invoked is a special jurisdiction conferred by statute as a part of the State's policy of insurance

regulation and control. It is not conferred for the protection of corporations' policyholders and creditors alone, but for the protection of the public as well. This clearly appears by the terms of the act; it again appears in the court's decree. In prosecuting an insurance company the State is acting for the public, and the public is in turn interested in the proceedings; though not nominally present as a party, it is nevertheless present in the person of the Attorney General."

And Judge Woolley said, at page 268:

"* * * As against stockholders, the law is equally effective. The law under which an insurance company is incorporated subjects it to State supervision and administrative control, and ordains the proceeding by which its life may be determined and its affairs wound up and liquidated. The rights of such a corporation are therefore subordinate to the rights of the State, and the rights of stockholders are no greater than those of the corporation. When, therefore, the statutory proceeding has been begun in a State court and by its commencement jurisdiction has been acquired over the corporation, neither the corporation nor its stockholders, nor its creditors can divest the court of its jurisdiction or deprive the State of its public function by subsequently invoking the aid of a Federal court to remove the corporation's property beyond the reach of the State court and thereby withdraw from the State court the subject matter of the action there pending. If this were not so, every action instituted by the state government against an insurance company might be interrupted and defeated by a nonresident stockholder filing in a Federal court a bill accompanied with the answer of an acquiescing corporation, after action has been begun in

> the State court and before in its orderly progress the property of the corporation has been physically seized. Thus the policy of the State would be thwarted and its administration overthrown; the State's creature would be more powerful than the State itself. We are satisfied that no such thing was contemplated either in Federal or State policy."

And in MITCHELL v. LAY, 48 F. (2d) 79 (1930), the Circuit Court of Appeals, Ninth Circuit, reversed in order requiring the Insurance Commissioner of California to turn over to a Federal receiver funds of an insolvent insurance company which were in his possession. We have already quoted the language of Judge Wilbur, supra, pages 31 and 32.

In LILLARD v. LONERGAN, 72 F. (2d) 865 (1934), the Attorney General of Kansas instituted quo warranto proceedings against The Wheat Farming Company for acting beyond its charter powers. The State court held that while a forfeiture of the charter was justifiable, it would for the present decree only that within a reasonable time the corporation discontinue its illegal activities and dispose of assets not needed for its lawful purposes. The court further decreed that if it should prove impossible for the corporation to limit its activities in this manner, it should then be liquidated and be dissolved. The court went on to say that if these orders were not complied with "the writ of ouster will issue and such further orders as may be necessary and expedient will be made". Thereafter creditors of the company successfully resorted to a Federal court for the appointment of receivers. There-

upon the State court appointed receivers to liquidate the business of the corporation and to dissolve its affairs. These receivers and the Attorney General of Kansas then petitioned the district court to discharge the receivers it had appointed and order them to deliver all of the property of the company to the receivers appointed by the State court. The district court denied the petition. Upon appeal, the Circuit Court of Appeals for the Tenth Circuit reversed the lower court, vacating its decree and directing its receivers to deliver all property in their hands as such receivers to the receivers subsequently appointed by the State court. Judge Lewis said at page 871:

> "The rule as between courts having concurrent jurisdiction over parties and subject matter, when a controversy arises as to which has the better right to possession, has no application here. The proceeding instituted in the state Supreme Court could not have been maintained in the Federal Court, nor the one in the Federal Court in the state Supreme Court. The one in the Federal Court was antagonistic to the one in the state court. The bill there sought to stay the hand of the state court, to nullify its probable action and thwart the purpose of the proceeding in that court. * * *"

(Certiorari refused November 12, 1934).

That is the precise case here, except that in the instant case and under the Pennsylvania law applicable an administrative official, and not a court upon the instance of an administrative official, had taken the intermediate action looking to the possible eventual liquidation of the corporation. Here the Secretary

of Banking placed the association upon a restricted basis pending his determination of whether to take possession as a liquidating receiver. In LILLARD v. LONERGAN, the State court, upon the instance of the Attorney General followed a similar policy with respect to a business corporation organized under the laws of that State.

We submit that in the present case, the District Court should have ordered its receivers to turn the assets of the building and loan association over to the Secretary of Banking, just as the Circuit Court of Appeals for the Tenth Circuit ordered the Federal receivers to turn over to the receivers subsequently appointed by the State court the assets of The Wheat Farming Company.

We insist that when the Secretary of Banking issued his order placing the association under restrictions and when its officers, complying with that order, performed what the Secretary of Banking directed in his partly administrative, partly judicial capacity, the control of the association was thereafter exclusively with the Secretary of Banking and with the State court in which he later filed his certificate of taking possession.

It is true that there was no court proceeding prior to that instituted in the district court. Nevertheless, the procedure before the Secretary of Banking ultimately leading to a court proceeding has the same character.

One of the reasons urged in the court below for appointing receivers was that a non-assenting stockholder of one of the constituent associations comprising the merger resulting in the formation of the Mortgage Building and Loan Association had obtained a judgment and was threatening execution against the Mortgage Building and Loan Association. Even if this averment justified the district court in appointing temporary receivers and enjoining any executions against the association, it cannot of course serve as a valid ground for the appointment of permanent receivers to liquidate the association. Nor can it justify the district court judge's denial of the Commonwealth of Pennsylvania's petition to intervene or of its request that the judge order the receivers he had appointed to turn the assets of the association over to the State Secretary of Banking after that official had taken possession of its affairs in the exclusive manner provided by State law.

There can be no doubt that the Commonwealth should have been permitted to intervene in this proceeding.

The higher Federal courts themselves have sustained the contention of the states and their administrative officials that where a system has been established by the state law for the creation, regulation, supervision and liquidation of insurance companies and banking institutions, that system will not be upset on the application of an individual stockholder or creditor for a Federal receiver.

In harmony with the decisions cited, this court should reverse the court below and order the discharge of the receivers appointed by the District Court following their prompt delivery of the association's assets to the Secretary of Banking.

IV

Cases Cited by the Courts Below

In his opinion, Judge Davis of the Circuit Court of Appeals cited to sustain his position, the following cases:

NATIONAL SURETY CO. v. STATE BANK, 120 Fed. 593, 602 (1903);

MORRILL v. AMERICAN RESERVE BOND CO., 151 Fed. 305, 313 (1907);

O'NEIL v. WELCH, 245 Fed. 261, 265 (1917);

LEADVILLE COAL CO. v. MCCREERY, 141 U. S. 475, 477 (1891).

We have already discussed O'NEIL v. WELCH, ante pages 44 to 47.

The NATIONAL SURETY COMPANY case did not involve the question whether a Federal court should appoint receivers to liquidate a State quasi-public corporation. It involved the right of the surety company to seek in a Fderal court equitable relief against enforcement of an unconscionable judgment rendered against it in a state court. The language of Judge Sanborn, quoted

by Judge Davis (R. 64), is part of the discussion of the complainant's right to obtain equitable relief even though the state statutes provide an original proceeding in the court in which the judgment was entered. Very properly the Circuit Court of Appeals for the Eighth Circuit said (p. 603): "the proceeding provided by the Code of Nebraska does not oust the jurisdiction in equity of the national Circuit Court" for the reason that "while state legislation may enlarge, it cannot destroy or impair, that jurisdiction." And further, "* * * the provisions of the Code of Nebraska * * * do not purport or attempt to destroy or to diminish the jurisdiction in equity of either the federal or the state courts."

The Commonwealth does not contend in the instant case that The Banking Act 1923 does that. It is the lack of a justiciable controversy that denies the shareholder complainant a right to relief.

In Morrill v. American Reserve Bond Co., Judge Sanborn said, at page 307:

> "* * * The Attorney General [of Missouri] and * * * his associates, speaking for the three officers of the state, say that, as this court has jurisdiction of the subject-matter and of the parties to this suit, they prefer to bring this property to, and place it in the hands of, this court * * *."

This case did not involve the question whether receivers could be appointed by a Federal court to liquidate a quasi-public corporation. If the case had involved this question, it would not have been comparable to the situation in the case at bar because the

state statutes of Missouri provided for the liquidation of bonding companies by receivers appointed by state courts.

LEADVILLE COAL CO. v. McCREERY, supra, involved the property of a commercial corporation in the possession of a Federal court receiver at the time dissolution proceedings against the company were instituted in a state court. The Supreme Court upheld the right of the receiver to deal with the assets without regard to the proceedings in the State court.

Judge Davis also quoted from Judge Welsh's opinion (R. 67, 68) a paragraph citing the following cases in which district courts appointed receivers for building and loan associations:

SLEEPER v. WINKEL, 122 Fed. 736 (C. C. E. D. Pa. 1903).

TOWLE v. AM. B. L. & INVESTMENT CO., 60 Fed. 131 (C. C. N. D. Ill. 1894).

WILSON v. PARVIN, 119 Fed. 652 (C. C. A. 6, 1903).

FLINN v. INTERSTATE B. & L. ASSN., 141 Fed. 672 (C. C. S. C. 1905).

UNIVERSAL SAVINGS & TRUST CO. v. STONEBURNER, 113 Fed. 251 (C. C. A. 4, 1902).

POWERS v. BLUE GRASS B. & L. ASSN., 86 Fed. 705 (C. C. Ky., 1898).

DOUGLASS v. KAVANAUGH, 90 Fed. 373 (C. C. A. 6, 1898).

MIERS v. COLUMBIA MUTUAL B. & L. ASSN., 157 Fed. 940 (C. C. S. D. N. Y. 1907).

COLTRANE v. BALTIMORE B. & L. ASSN., 110 Fed. 272 (C. C. Md. 1901).

MACMURRAY v. GOSNEY, 106 Fed. 11 (C. C. W. D. Pa. 1901).

ALEXANDER v. SOUTHERN HOME B. & L. ASSN., 110 Fed. 267 (C. C. N. D. Ga. 1900).

MILES v. NEW SOUTH B. & L. ASSN., 111 Fed. 946 (C. C. E. D. La. 1900).

MANORITA v. FIDELITY TRUST & LOAN CO., 101 Fed. 8 (C. C. S. D. Ala. 1900).

GALLOWAY v. MICH. SAVINGS & LOAN ASSN., 206 Fed. 241 (C. C. A. 6, 1913).

COOPER v. NEWTON, 160 Fed. 190 (C. C. S. D. Ga. 1908).

SOLOMONS v. AMERICAN B. & L. ASSN., 116 Fed. 676 (C. C. N. D. Ga. 1902).

It will be noted that the latest of these cases was decided in 1913, and that case (GALLOWAY v. MICHIGAN SAVINGS & LOAN ASS'N) involved a receivership proceeding dating from 1901. That was long before the States had adopted the policy of establishing a system for the organization, supervision, regulation and liquidation of building and loan associations.

For example, in Pennsylvania the Banking Commissioner was for the first time given exclusive power to liquidate building and loan associations by the Act of May 21, 1919, P. L. 209.

In none of these cases was the question considered whether the Federal courts would appoint receivers to liquidate quasi-public corporations contrary to the policy of State law providing an exclusive method for this purpose.

CONCLUSION.

This case, GORDON, SECRETARY OF BANKING v. OMINSKY et al., October Term 1934, No. 395, and GORDON, SECRETARY OF BANKING v. WASHINGTON, et al., and GORDON, SECRETARY OF BANKING v. O'BRIEN et al., are the only decisions of United States Circuit Courts of Appeal refusing to give effect to State laws governing the method of liquidating quasi-public corporations. All of these cases were decided at about the same time. In the two last mentioned, petitions for certiorari to this court are pending. They involve the appointment of receivers to take out of the hands of the Secretary of Banking assets of a closed bank.

These decisions reflect a complete change in the attitude of the Circuit Court of Appeals of the Third Circuit on this important subject. In the earlier cases, LYON v. MCKEEFREY, 171 Fed. 384 (1909) and O'NEIL v. WELCH, 245 Fed. 261 (1917) this same court gave strong expression to its belief that Federal Courts should support State systems for the organization, regulation, supervision and liquidation of quasi-public

corporations. The former case dealt with a bank; the latter with an insurance company.

In the following cases, stockholders of quasi-public corporations were held to have no standing to seek relief in a Federal Court, contrary to the provisions of the State law under which the corporations were organized:

McGarry v. Lentz, 13 F. (2d) 51 (1926), C. C. A., Sixth Circuit.

Cook v. Illinois Bankers' Life Ass'n., 46 F. (2d) 782 (1931), C. C. A., Seventh Circuit.

In the following cases, circuit courts of appeal reviewed the exercise of discretion by district courts in appointing receivers for quasi-public corporations or for certain assets of such corporations, and sustained the State authorities:

Mitchell v. Lay, 48 F. (2d) 79 (1930) C. C. A., Ninth Circuit. Petition for Certiorari to U. S. Supreme Court denied. 283 U. S. 864 (1931).

Bank of Bay Biscayne v. Hankins, 42 F. (2d) 209 (1930) C. C. A., Fifth Circuit.

Amos v. Trust Co. of Florida, 54 F. (2d) 286 (1931) C. C. A., Fifth Circuit. Petition for Certiorari to U. S. Supreme Court denied. 285 U. S. 559 (1932).

In the following cases receiverships were set aside even though the bill in equity had been filed before the

state officer took possession of the quasi-public corporation's property and assets:

AMOS v. TRUST CO. OF FLORIDA, 54 F. (2d) 286 (1931) C. C. A., Fifth Circuit. Certiorari refused. 285 U. S. 559.

MITCHELL v. LAY, 48 F. (2d) 79 (1930) C. C. A., Ninth Circuit. Certiorari refused. 283 U. S. 864.

In the following cases Federal receivers were required to turn over to the state authorities the assets of a quasi-public corporation at the instance of the proper state officer. In all of them the district court was reversed:

LYON v. MCKEEFREY, 171 Fed. 384 (1909) C. C. A., Third Circuit, Judge Gray.

MITCHELL v. LAY, 48 F. (2d) 79 (1930) C. C. A., Ninth Circuit. Certiorari refused, 283 U. S. 864.

O'NEIL v. WELCH, 245 Fed. 261 (1917) C. C. A., Third Circuit.

LEE v. EDMUNDS, 66 F. (2d) 122 (1933) C. C. A., Fifth Circuit.

However, in the two cases last cited the Federal receivership was junior to a state receivership.

Thus we find support for our position in the expressions of the Circuit Courts of Appeal of the Second, Third, Fifth, Sixth and Ninth Circuits.

Except for the present case and the three other cases decided at practically the same time, there are no Circuit Court of Appeals decisions to the contrary in any circuit.

On principle, we submit that the decree of the Circuit Court of Appeals should be reversed.

The complainant in the district court is a stockholder of the building and loan association. He is bound by the laws of Pennsylvania establishing the State's system for the supervision, regulation and liquidation of such associations. He could not have a justiciable controversy with the association regarding its liquidation.

But if such a controversy could exist, and diversity of citizenship gave the district court jurisdicton, that court abused its discretion in appointing permanent receivers to liquidate the association upon a consent answer, when the State Secretary of Banking had actually taken jurisdiction over this association and had placed it upon a restricted basis. The Federal courts should not, in such cases, lend their aid to efforts to frustrate the state's settled policy in regulating and liquidating quasi-public corporations.

Finally, notwithstanding the fact that receivers had been appointed, the State certainly had such an interest in the proceedings as to entitle it to intervene; and the court below should have ordered the assets of the association turned over to the Secretary of Banking as prayed in his petition. Comity between the

Federal and State governments in matters within the proper cognizance of their respective authorities, demands that this action be taken.

For these reasons, we believe that the decree of the court below should be reversed.

Respectfully submitted,

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HAROLD D. SAYLOR,
Deputy Attorney General.
Attorneys for Petitioner.

APPENDIX.

EXCERPTS FROM THE PENNSYLVANIA BANKING ACT OF 1923.

(Act of June 15, 1923, P. L. 809, as amended by the Act of May 5, 1927, P. L. 762, the Act of May 28, 1931, P. L. 193, the Act of June 12, 1931, P. L. 563, and the Act of May 20, 1932, P. L. (Special Session) 7, 7 PS Sec. 1, et seq.)

Section 1. Short Title.—Be it enacted, &c., That this act shall be known and may be cited as "The Banking Act 1923."

Section 2. Definitions.—Except as otherwise expressly indicated, the following words, wherever used in this act, shall be taken and construed to have the following meanings:

"Department" means Banking Department, which shall after the fifteenth day of June, one thousand nine hundred and twenty-three, be known as the Department of Banking.

"Secretary" means the Secretary of Banking.

"Person" means an individual, a partnership, or an unincorporated association.

"Court" means the court of common pleas of the county where the banking house or other place of business of the corporation or person in question is lo-

cated, and in which the certificate of liquidation is filed, as required by section twenty-two of this act.

"Prothonotary" means the prothonotary of such court.

* * * * * * *

Section 4. Department—Scope of Supervision—Powers—Duties.—There shall continue to be a separate and distinct department, known as the Department of Banking, charged with the supervision of all the corporations and persons hereinafter described, and with the duty of taking care that the laws of this Commonwealth in relation thereto shall be faithfully executed, and that the greatest safety to depositors therein or therewith and to other interested persons shall be afforded.

The said supervision, duties, and powers shall extend and apply to the following corporations now or hereafter incorporated under the laws of this State or under the laws of any other State and authorized to transact business in this State; namely, all such corporations having power to receive and receiving money on deposit or for safe-keeping otherwise than as bailee, including all banks, banking companies, cooperative banking associations, trust, safe deposit, real estate, mortgage, title insurance, guarantee, surety and indemnity companies, savings institutions, savings banks, and provident institutions. The said supervision, duties, and powers shall also extend and apply to mutual savings funds, building and loan associations, and corporations doing a safe-deposit business only.

Section 13. Power to Examine and Inspect.—Every corporation and person included within the supervision of the department as set forth in section four of this act, together with all the property, assets, and resources of such corporation or person, shall be subject to inspection and examination by the secretary or his deputies, or any qualified examiners of the said department when such examiner is authorized in writing, under the official seal of the department, by the secretary or a deputy, to make such examination and inspection.

Section 14. Examinations—

(a) In General.—It shall be the duty of the secretary, at least once in each year, to examine or cause to be examined the books, papers, and affairs of each and every corporation and person subject to the supervision of the department. The secretary may also, at any time, make such special investigations or examinations as, in his opinion, the exigencies of any case may require. Whenever he shall deem it necessary or proper, he shall assign a qualified examiner or examiners to make any such examination or investigation, which examiner or examiners shall have power to make a thorough examination into all the business and affairs of the corporation or person in all departments and of all property, assets, and resources wherever situated, and, in so doing, to examine, under oath or otherwise, any of the officers, agents, employes, or members of the corporation or person, or any corporation or person in possession of any assets, or having knowledge of any assets, of the corporation or person

under examination. The examiner or examiners shall make a full and detailed report of the condition of the corporation or person under examination, or such special report as may be directed by the secretary.

* * * * * * *

Section 15. Reports to Secretary—

(a) In General.—Every corporation and person subject to the supervision of the department, except building and loan associations doing business exclusively within this State, shall make and render to the secretary not less than two or more than five reports of its or his conditions during each year. The number, form, and manner of such reports shall be prescribed by the secretary by general rule or regulation. Every such report shall be verified by the oath or affirmation of the president, cashier, treasurer, or other managing officer in the case of a corporation or association, by a member of the firm in the case of a partnership, and by an individual banker in person. It shall be attested as correct by the signatures of at least three of the directors, trustees, or other managers of a corporation or association, and by the signatures of at least two of the members of a partnership.

Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the corporation or person at the close of business on any past day specified by the secretary, and shall be transmitted to him within five days or such further time as he may, in his discretion, allow, after the receipt of a request or requisition thereof from him.

Abstract summaries of two of said reports, designated by the secretary, in each year, except the reports

of building and loan associations doing business exclusively within this State, shall forthwith be published by the corporation or person in a newspaper, and proof of such publication, verified by affidavit, shall be furnished to the secretary.

Building and loan associations doing business exclusively within this State shall, in the manner hereinbefore provided, make and render one report during each year. No abstract summaries of such reports need be published.

The secretary shall have power to call for a special report from any corporation or person under the supervision of the department, including building and loan associations, whenever, in his judgment, the same may be necessary to a full and complete knowledge of its or his conditions.

The reports and publications provided for in this clause shall be in lieu of all reports and of all publications for similar purposes heretofore required by law to be made.

* * * * * * *

Section 20. Orders by Secretary.—Whenever it shall appear to the secretary that any corporation or person under the supervision of the department has violated any provision of this act or any law regulating the business of such corporation or person, or is conducting business in an unauthorized or unsafe manner, or that any such corporation has an impairment of capital, the secretary may issue an order, under his hand and seal of office, directing such corporation or person to discontinue such violation of law or such unauthorized or unsafe practices, or directing such cor-

poration to make good, within a time of not more than sixty days after notice by the secretary, any impairment or deficiency of capital.

Section 21. Power of Secretary to Take Possession. —The secretary may, after hearing had upon notice given, with the approval and consent of the Attorney General, take possession of the business and property of any corporation or person subject to the supervision of the department, whenever it shall appear to him that such corporation or person:

I. Has violated any law regulating its or his business, and has persisted in such violation in disregard of an order duly made by the secretary;

II. Is conducting business in an unauthorized or unsafe manner, and has persisted in disregard of an order duly made by the secretary;

III. Is in an unsafe or unsound condition to continue business: Provided, in such case, That the secretary may forthwith, without such hearing and consent of the Attorney General, take possession of the business and property of any such corporation or person receiving moneys on deposit, when and if, in his opinion, the protection of depositors and the public requires such peremptory action;

IV. Has an impairment of capital, which has not been restored or made good within the time fixed by order of the secretary;

V. Has suspended payment of obligations;

VI. Has neglected or refused to comply with the terms of any lawfully issued order of the secretary;

VII. Has refused, upon proper demand, to submit the records and affairs of the business to the secretary,

a deputy, or any duly authorized examiner or agent of the department;

VIII. Has refused to be examined, upon oath or affirmation, regarding such affairs;

IX. Is in the hands of a receiver appointed by any court, or in any bankruptcy proceeding, or of an assignee or trustee for creditors appointed by such corporation or person.

* * * * * * *

Section 22. Certificate of Taking Possession.—When the secretary shall have duly taken possession of the business and property of a corporation or person as provided in section twenty-one of this act, he shall forthwith make, under his hand and official seal, a certificate setting forth that he has so taken possession, and shall file such certificate in his office, and cause a certified copy thereof to be filed in the office of the prothonotary, who shall index the same in the judgment index under the name of the corporation or person as defendant and the name of the secretary as plaintiff.

From and after the filing of such certified copy in the office of the prothonotary, the secretary shall supersede any receiver previously appointed by any court for, or any assignee or trustee for creditors appointed by, such corporation or person.

Such superseded receiver, assignee, or trustee shall forthwith file his account in the court having jurisdiction thereof, and pay over and deliver to the secretary all moneys, securities, assets, and property of such corporation or person in his custody, possession, or control. Said courts shall allow credit for expenses and for the disbursements properly incurred or made prior

to the taking possession by the secretary, and shall allow proper compensation to said receiver, assignee, or trustee, and his counsel, which, when determined, shall be paid out of the funds of said corporation or person in the hands of the secretary.

Section 23. Injunction to Restrain Secretary.—Whenever the secretary takes possession of the property and business of any corporation or person, such corporation or person may, at any time within ten days, apply to the court for an order requiring the secretary to show cause why he should not be enjoined from continuing such possession. The secretary may be served personally wherever found within the State, or by leaving a copy with the deputy in charge of his office, or by serving the special deputy appointed by him in such proceeding. At the hearing, a copy, certified by the secretary or one of his deputies, of any report of a duly instituted examination of such corporation or person shall be prima facie evidence of the facts therein stated; and if, from such report or reports or other evidence, there shall appear to be just cause for the taking and continuing of possession by the secretary, he shall not be enjoined, unless such report or reports or other evidence shall be overcome by proper proof produced by such corporation or person, in which event the court shall direct the secretary to refrain from further proceedings and to surrender such possession.

Section 24. Special Agents and Assistants.—The secretary may, by the certificate of taking possession provided for in section twenty-two of this act, or by a subsequent certificate in like manner made and filed,

appoint one or more special deputies as agent or agents to assist him in continuing or liquidating the business and affairs of any corporation or person in his possession. He may, from time to time, delegate to such special deputy or deputies such duties connected with such continuation or liquidation as he may deem proper. He may employ such expert assistants and legal counsel, and may retain such of the officers and employes of such corporation or person, as he may deem necessary in the continuation of the business or the liquidation and distribution of the assets. He shall require such security as he may deem proper from his agents and assistants appointed pursuant to the provisions of this section.

Section 25. Notice to Parties Holding Assets.—When the secretary shall have taken possession of the property and business of any such corporation or person, he shall forthwith give notice in writing of such fact to all corporations and persons holding any assets thereof. No one having such notice or actual knowledge that the secretary has so taken possession shall have a lien or charge against any of the assets of such corporation or person for any charge, payment, advance or clearance thereafter made or liability thereafter incurred. The status of all parties shall become fixed on the date the secretary files his certificates of possession in his office in Harrisburg, as provided in section twenty-two of this act.

Section 26. Inventory of Assets.—After the secretary has taken possession as aforesaid, he shall make, or cause to be made, a complete inventory of the assets of such corporation or person, which inventory

shall be verified by oath or affirmation of the person or persons making the same, and shall forthwith file such inventory in his office.

Section 27. Suspension or Continuation of Business.—The secretary is authorized, upon taking possession of the property and business of such corporation or person, to continue or suspend the business for such period as he may deem necessary to enable him to determine whether to liquidate the affairs of such corporation or person, and, during such period, to take such action as in his judgment is necessary to conserve the assets and business.

Section 28. Surrender of Possession by Secretary. The secretary may, upon conditions approved by him, surrender possession in all cases, prior to liquidation and final distribution, for the reasons and purposes and in the manner following, (a) because he is without funds to continue or to liquidate the business and property of which he has taken possession; or (b) to permit to be carried into effect a special plan of liquidation, reorganization, and/or rehabilitation submitted by such corporation or person and assented to by creditors whose claims, as certified by the secretary, aggregate not less than ninety per centum in amount, and not in number, of the total claims certified by the secretary to be due by such corporation or person; provided, such special plan has been approved by the court, excepting in cases of building and loan associations as to which the assent of fifty-one per centum in amount, and not in number, of the total claims so certified by the secretary shall be sufficient; or (c) where

such corporation or person has been found to be solvent, for the purpose of permitting it or him to resume business; or (d) to permit such corporation or person to transfer and convey, for what the secretary may determine to be a good and sufficient consideration, a part or parts of its or his business, property, moneys, credits and other assets to a corporation, existing or to be formed, or to a person; the said business, property, moneys, credits and other assets in question to be transferred and conveyed, except as the secretary may specify otherwise in the order filed by him in the office of the prothonotary as hereinafter provided for, free of all claims against and general liens thereon. The corporation or person taking over the said business, property, moneys, credits and other assets shall pay for the same at appraised values approved by the secretary. The said payment may, with the approval of the secretary, be met by making available, on demand, to depositors and/or other creditors of the transferor corporation or person, funds on deposit with the transferee corporation or person; provided, that the last named corporation or person is empowered to engage in or is actually engaged in the business of a bank of deposit under the supervision of the Secretary of Banking, and when the payment is so met, such funds shall be paid by the transferee corporation or person to said depositors and/or other creditors of the transferor corporation or person pro rata according to their claims and in such percentages thereof or amounts as may be determined by the secretary.

The secretary may retain possession of any balance of assets not transferred and conveyed as aforesaid,

or he may stipulate, as a condition to his approval of a partial transfer, that the balance of assets shall be transferred and conveyed to such number of trustees, as the secretary may designate, for the purposes of liquidation and distribution of the proceeds to those entitled in accordance with the laws of this Commonwealth. In the event the secretary determines to transfer the said balance of assets to such liquidating trustees, they shall be chosen by the creditors and stockholders of such corporation or person at an election, called for that purpose by the secretary, to be conducted under his supervision and subject to his approval; the electors to be listed by the secretary, and each creditor to vote according to the amount due to him as it may appear on the secretary's list, and each stockholder to have one vote for each share of stock held by him; the creditors as a group and the stockholders as a group each to elect such number of all of the trustees as the secretary may designate, but in no case shall the number of trustees designated by the secretary, to act for and be elected by the creditors, be less than two-thirds of the total number of trustees to be elected. The secretary's certificate as to such designation and the result of the election filed in the office of the prothonotary shall be conclusive. The balance of assets remaining in the hands of the secretary, or transferred to such liquidating trustees, may, if, in the judgment of the secretary as certified in the order filed by him in the office of the prothonotary and hereinafter provided for, the circumstances of the prior sale of the other part of the assets so require, be made subject to a preferred claim over other creditors in favor of the purchaser of such other part of the

assets, coupled with the condition that should the portion of the assets previously sold fail to realize in the hands of the purchaser the full purchase price paid therefor, the secretary, or such liquidating trustees, will make good out of the assets in his or their possession the deficiency: Provided, That a claim for such deficiency be made and proved within one year from the date of the transfer; and provided, also, that if the assets previously sold should realize more than the amount paid therefor, the surplus shall be paid to the secretary, or to such liquidating trustees, to be added to the fund in the hands of the secretary, or such liquidating trustees, for distribution to those entitled under the law to the assets remaining in his or their possession.

The secretary and/or such liquidating trustees shall have the right to lease real estate belonging to such corporation or person for such terms and on such conditions as may to him or them seem most advantageous to the estate in his or their possession, and to sell and dispose of the assets and property of such corporation or person, and to make other contracts which, in his or their judgment will prove helpful in carrying into effect the conditions and terms under which the secretary surrenders possession, or which, in his or their judgment, will assist in the liquidation and distribution of those entitled under the law to the proceeds of the property and the assets retained by the secretary or transferred to the liquidating trustees for liquidation and distribution in accordance with law.

The secretary may require the liquidating trustees to report to him, from time to time, regarding the liquidation and distributions conducted by them, and, if he

is not satisfied with the conduct of the trustees in those regards, the secretary, by certificate duly filed in his office and in the office of the prothonotary, may cancel the surrender and again take possession of all the property, moneys, credits and other assets then in the hands of the trustees for liquidation and distribution in accordance with law.

Whenever the secretary shall surrender possession under the provisions of this section, he shall forthwith issue an order, under his official seal, stating therein the conditions and terms under which, and the purposes for which, he has surrendered possession and shall file said order in his office, and cause a certified copy thereof to be filed in the office of the prothonotary, who shall thereupon cause the entries upon the judgment index made pursuant to section twenty-two of this act to be satisfied, and the secretary shall thereupon be discharged from all further liability in the premises.

Whenever the secretary makes a surrender under this section, he shall file in court an account of his administration of the estate to the date of the surrender, showing its then present status, all receipts in cash and expenses incurred, including fees paid out of the fund to attorneys and others; but neither the audit of the account, nor the adjudication of questions there arising, shall be permitted to hinder or delay the carrying into effect of the conditions and terms of the surrender of possession. When such account is filed and adjudicated, the balance on hand shall be awarded by the court to creditors and others entitled thereto under the law: Provided, That if, on final liquidation and distribution, the assets of any corporation or per-

son should prove insufficient to pay in full all claims against the corporation or person, nothing in this section contained and no action taken pursuant to the provisions hereof shall operate to relieve stockholders of such corporation from their liability, if any, under the act of May eleventh, one thousand eight hundred and seventy-four (Pamphlet Laws, one hundred thirty-five), number sixty-eight: Provided further, That liquidating trustees named under this section shall have all the rights to enforce the individual liability of such stockholders as are conferred on the secretary under section thirty-seven of the act of June fifteenth, one thousand nine hundred and twenty-three (Pamphlet Laws, eight hundred nine).

The secretary shall not authorize any decrease of capital stock by a corporation affected by the provisions of this section, except upon compliance by the corporation with the provisions of law as to such decrease.

Section 29. Status of Secretary as Receiver.—Except as herein otherwise provided, the secretary shall, when he has taken possession of the business and property of a corporation or person, have all the rights, powers, and duties of a receiver appointed by any court of equity in this Commonwealth; and he shall be vested, in his official capacity, with all the rights, powers, and duties of such corporation or person and with all the property of such corporation or person, including debts due, liens, or securities therefor, and rights of action or redemption, whether or not the property of such corporation or person, including debts due, liens, or securities therefor, and rights

of action or redemption, are held in the name of such corporation or person, or in the name of some other corporation or person, but actually the property of the corporation or person of which, or of whom, the secretary has possession.

He shall be the representative of the creditors of the corporation or person, and entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or encumbrance, which could have been avoided by the creditors or any of them, or by which it is attempted to give any creditor unlawful preference over another.

He may, with leave of court obtained on petition after notice to all creditors of whom he has knowledge, surrender to the corporation or person any assets, including choses in action, whether the subject of pending proceedings or not, which are burdensome and of no advantage to creditors.

He may enter into leases for real estate belonging to the corporation or person for a period not to exceed three (3) years, upon such terms as may be acceptable to him, without leave of court; and with leave of court may enter into leases for such property for a term not exceeding ten (10) years.

He may, by agreement in writing with the mortgagor and without leave of court, extend the period for the payment of a mortgage on real property for a period not to exceed three years upon such terms as may be acceptable to him.

He may, without leave of court, borrow money from the Reconstruction Finance Corporation and any

other agency of the United States Government or Commonwealth of Pennsylvania, for the purpose of assisting him in the liquidation of the corporation or person, and to expedite the distribution of the assets thereof to the depositors and creditors of such corporation or person, and pledge as security for the loan of such funds any personal property or real estate of such corporation or person.

Section 30. Power of Court to Make and Enforce Orders.—The court having jurisdiction shall have power to make and enforce any and all orders necessary and appropriate to enable the secretary to discharge his duties in connection with the business, property, and affairs of any corporation or person taken into possession by the secretary under the provisions of this act, upon petition of the secretary, acting personally or through his duly authorized deputy, setting forth the facts; and the court shall also have the power, upon petition of the secretary, acting personally or through his duly authorized deputy, to order and direct other corporations or persons in possession of assets or property, belonging to the corporation or person in possession of the secretary, to transfer or convey said property or assets to the secretary, and to execute and deliver any and all necessary instruments in writing to accomplish that purpose.

Section 31. Continuance of Possession—Exceptions.—When the secretary shall have duly taken possession of the business and property of corporation or person as provided in section twenty-one of this act,

he shall hold such possession until the affairs of such corporation or person have been liquidated by him, unless:

I. He shall have been directed by order of court to surrender such possession pursuant to the provisions of section twenty-three of this act;

II. He shall have permitted a resumption of business, or a sale or conveyance of property and franchises, or made a surrender, pursuant to the provisions of section twenty-eight of this act;

III. The stockholders of such corporation, after payment of all creditors in full, shall have elected a trustee or trustees, to continue the liquidation of such corporation, or the court shall have appointed such trustee or trustees, pursuant to the provisions of section fifty of this act, and such trustee or trustees shall have duly qualified to take possession of the remaining assets of such corporation; or,

IV. The depositors and other creditors of such person and the expenses of such liquidation shall have been paid in full.

Section 32. Recording Certificate—Sales—

(a) Recording Certificate of Possession or Surrender.—When the secretary has taken possession of the business and property of a corporation or person, he shall, if there be any real property, file in the office of the recorder of deeds in each county of this State, or with the proper official in any other State or country, where any such real property shall be situated, a certified copy of the certificate required by section twenty-two of this act, which copy shall be recorded in the deed book, and indexed in the grantor's index

in the name of such corporation or person and in the grantee's index in the name of the secretary, and shall also be registered with the proper authority empowered to keep a register of real estate, if any there be; and when the secretary has surrendered possession of the business and property of a corporation or person, he shall in the same manner file a certified copy of the order provided for by section twenty-eight of this act, which shall be in like manner recorded, and shall be indexed in the name of the secretary as grantor and the name of such corporation or person as grantee, and shall also be registered as aforesaid.

(b) Sales of Real and Personal Property.—The secretary may sell at public sale any or all of the real and personal property of such corporation or person without any order of court. He may, with leave of court, after such notice to creditors by advertising or otherwise as the court may direct, sell either real or personal property at private sale upon such terms and under such conditions as the court, upon petition of the secretary, may direct, and all sales theretofore made may be approved by the court.

He may, without leave of court, sell either real estate or personal property at private sale, under such terms as to him may appear reasonable and proper, provided that the net consideration realized from such sale shall be not less than the appraised value of the asset so sold, as set up and established in the inventory and appraisement, filed in the court having jurisdiction over the estate of such corporation or person, as required by section thirty-eight of this act as amended. Sales under this section may be either all

for cash or partly for cash and partly for evidences of indebtedness approved by the court.

(c) Sales of Real Estate Outside of the County.—When any real property of such corporation or person is situated in a county other than that where the banking house or other place of business is located, a petition for leave to sell such property at private sale shall be filed in the court having jurisdiction of the liquidation proceedings, which court, if satisfied of the propriety of such sale, shall make an order or decree authorizing the secretary to sell such real property or so much thereof as the court may designate. Thereupon it shall be the duty of the court of common pleas of the county where in the real property so designated is situated, on petition of the secretary, to make an order for the sale of said property or so much thereof as the court having jurisdiction of the liquidation proceedings shall have designated; and the secretary shall in all cases make a return of the sale to the court of the county in which the real property is situated. If the same be approved by said court, it shall be confirmed, and a certified copy of the return and of the decree of confirmation shall be filed in the court having jurisdiction of the liquidation proceedings.

(d) Sale of Listed and Unlisted Securities.—Listed and unlisted securities may be sold on any of the stock exchanges or otherwise at such time or times, and in such manner as may be determined by the secretary to be necessary for the best interests of the estate of said corporation or person.

Section 33. Execution of Deeds and Documents.—The secretary may execute, acknowledge, and deliver any and all deeds, assignments, bills of sale, releases, extensions, satisfaction, and other instruments necessary and proper to effectuate any sale, lease, or transfer of real or personal property, or to carry into effect any power conferred or duty imposed upon him by this act or by order of court. Any instrument executed pursuant to the authority hereby given shall be valid and effectual for all purposes as though the same had been executed by the officers of such corporation, by authority of its board of directors, or by such person individually.

Section 34. Compromises.—The secretary may, with leave of court, compound or compromise any debt, claim, or judgment due to the corporation or person, and discontinue any action or other proceeding pending therefor, if done in good faith and after proper inquiry; and may require all mortgages, conditional contracts, pledges, and liens of or upon any real or personal property of such corporation or person, to be satisfied, cancelled, or assigned to him, as he may deem best, or he may sell the property subject thereto.

Section 35. Actions and Suits.—For the purpose of executing any of the powers and performing any of the duties hereby conferred and imposed upon him, the secretary may, in the name of the corporation or person, prosecute and defend any and all actions and proceedings at law, in equity, or otherwise, pending at the time when the secretary takes possession of the business and property of such corporation or person.

He may, by bill of discovery or other legal or equitable proceeding, obtain information of, and sue for and recover, any assets, debts, or damages, which such corporation or person might sue for and recover, or which any of the creditors might make available for the payment of their claims.

He may, at any time while he is in possession of the property and business of a corporation, institute and maintain against the directors, trustees, managers, or officers, any action or proceeding which is vested in such corporation or in the stockholders or creditors thereof.

He shall be liable to suit, in his representative capacity, by any person seeking to recover specific property if such property could have been recovered as against the creditors of the corporation or person levying an execution thereon.

Section 36. Judgments Not to Be Liens—Stay of Execution.—No mechanic's lien shall attach, nor shall any other lien attach, to any of the property or assets of the corporation or person by reason of the entry of any judgment against such corporation or person after the secretary has taken possession of its or his property and business and filed a certificate in his office in the capitol at Harrisburg, as required by section twenty-two of this act, and so long as such possession continues.

During such time no execution or attachment shall issue against such corporation or person, nor shall any pending execution or attachment be proceeded with except by special leave of the court, nor shall any pledges holding any assets pledged by any such person or cor-

poration as collateral or in pledge, but belonging to others and actually known as such by the pledgee at the time of the pledge, proceed to forfeit or sell any such collateral or pledged assets after the secretary has taken possession without express permission of the secretary, any provision in any collateral note or agreement to the contrary notwithstanding: Provided, That if the secretary refuses such permission, said pledgee may, with notice to the secretary, apply to the court for leave to sell the collateral held in pledge, and the court may thereupon grant such leave or make such order, and upon such terms, as will best protect the interests of all parties concerned: Provided further, That if such collateral so pledged by any such person or corporation is accompanied by the obligation of the original borrower, the pledgee shall have the right to exercise all the rights, powers and privileges in respect to such collateral, including sale, contained in the obligation held by such pledgee.

No person or corporation shall repledge any collateral held by such person or corporation unless accompanied by the obligation of the original borrower, nor for an amount exceeding the amount of the original obligation due at the time the collateral is repledged.

Any violation of the provisions of this section shall be a misdemeanor, upon conviction whereof, the person so offending shall be sentenced to pay a fine of not exceeding five thousand dollars, or imprisonment for a term not exceeding five years, or both, at the direction of the court.

Section 38. Inventory and Appraisement—Statement of Liabilities.—When the secretary has determined to liquidate the affairs of any such corporation or person, he shall forthwith cause an inventory and appraisement of the assets of such corporation or person, under oath or affirmation, to be made in duplicate, by two disinterested appraisers chosen by him, and shall file such inventories and appraisements, one in his office, and the other in the office of the prothonotary; and, for the purpose of enabling the secretary to do so, he or his duly authorized deputy is hereby empowered to call before him, by subpoena, with or without books and papers, and to examine, the corporation or person, or the officer, director, or employes thereof, taken in possession, under oath, or any person who, he or they have reason to believe, has knowledge of other or further assets of the said corporation or person, or any person who, he or they believe, can give information touching the same. Every witness shall be entitled to receive, out of the estate of the corporation or person, the usual witness fee and mileage for this attendance for these purposes.

* * * * * * *

Section 41. Notice to Depositors and Creditors.—When the secretary shall have determined to liquidate the affairs of such corporation or person, he shall forthwith give written or printed notice to all depositors to produce to him their deposit or pass books for settlement, stating in such notice the amount which the books of the corporation or person show to be due to each depositor, subject to outstanding checks, and notifying such depositors that, unless a settlement of the

deposit or pass books shall show a different amount to be due, or unless a depositor shall, within four months from the date of such notice, make proof, in the matter hereinafter set forth, that the amount due him differs from the amount as shown by the books of the corporation or person, the amount last mentioned will be conclusive as to the amount of the claim of such depositor, subject, as aforesaid, to any outstanding checks.

The secretary shall, at the same time, give written or printed notice to all creditors other than depositors, so far as known to him, to make proof of their claims in the manner hereinafter set forth, within four months from the date of such notice, or be debarred from coming in upon the fund.

He shall also advertise such notices to depositors and other creditors in a newspaper, and in the legal newspaper, if any, designated by rules of court for publication of legal notices in said county, once a week for four successive weeks.

The time within which said depositors and creditors shall make proof of their claims, or make objection to the amount of their deposits as stated by the secretary, may, in the discretion of the secretary, be such period as he may prescribe less than four months but not less than thirty days.

* * * * * * *

Section 45. Partial or Final Account—Objections. —At the expiration of the time fixed by the notice and advertisement for the presentation of claims prescribed in section forty-one of this act, the secretary may file a partial or final account, consisting of a statement of receipts and expenditures, together with

a list of the claims which have been allowed, and, separately, a list of the claims which have been objected to or are disputed, showing, as to all claimants, the names, addresses, and amounts.

If no account is filed within a year from the time when the secretary takes possession, any party interested may petition the court for an order on the secretary requiring the filing of an account.

Any account filed by the secretary shall be duly verified by him under oath or affirmation. Upon the filing thereof, he shall give written or printed notice, to all the depositors and other creditors known to him, of such filing, and that, unless objections shall be filed within thirty days from the date thereof, the same will be confirmed absolutely. He shall also, at the same time, advertise such notice in two newspapers once a week for four successive weeks.

During such period of thirty days, any depositor, other creditor, stockholder, or anyone having any interest, may file in the court objections in writing to said account or to the allowance of any of said claims, a copy of which objections shall forthwith be served upon the claimant whose claim is objected to, or his counsel, and upon the secretary, or his counsel, or the special deputy appointed by him in such proceeding. In the case of the liquidation of building and loan associations, wherever, in this act, the word "creditors" is used, it shall mean shareholders and/or creditors; and in all other cases the word "creditors," wherever used in this act, shall mean depositors and/or creditors.

Section 46. Distribution.—If, at the expiration of

said period of thirty days from the filing of the account, no objections shall have been filed thereto, the same shall be confirmed absolutely. In case objections or exceptions are filed to any claim or claims, the account shall be confirmed absolutely as to those claims against which no objections or exceptions have been filed, and a partial or final dividend, as the case may be, shall be declared and paid by the secretary on all claims as to which no objections or exceptions have been filed. In case there shall be any disputed claim or any claim to which objections shall have been duly filed, the dividend shall be calculated as if all claims were valid and approved, and, after deducting and setting apart such portion of the dividend as may be declared on claims, in accordance with the priorities fixed by law, which are disputed or objected to, the balance shall be distributed among the other claims. If all or any of the claims disputed or objected to shall thereafter be determined to be valid, they shall then receive their portions of such dividend in accordance with the priorities fixed by law. If all or any of such claims be determined to be invalid, the portions of such dividend set apart for them shall be distributed to the valid claims.

Section 47. Conclusiveness of Confirmation and Distribution.—The confirmation of a partial account and distribution thereunder, as aforesaid, shall be conclusive only as to the fund distributed, and shall not prevent the proof and allowance, out of the fund involved in any subsequent account, of claims not presented in time for allowance out of such previous fund.

The confirmation of a final account and distribution

thereunder, after the objections thereto, if any, have been adjudicated as hereinafter provided, shall be conclusive; and shall work and effect a discharge of the secretary and all deputies or their sureties, from all liability in the matter; and the secretary or his successor, except as hereinafter provided in section fifty of this act, is authorized and empowered to destroy all records belonging to the corporation or person in his possession at the expiration of seven years from the date of the absolute confirmation of the final account of the secretary.

Section 48. Hearing and Decision of Matters in Controversy.—If there shall be claims disputed or objected to, or if there shall be objection to the account, the court shall itself, without delay, hear and decide the matters in controversy. The court shall fix a time and place for the hearing, of which notice shall be given by the secretary to all depositors and other creditors whose claims have been disallowed by the secretary, or excepted or objected to by other depositors, creditors, or stockholders, as well as to those depositors, creditors, or stockholders, who have objected to the account or to claims allowed in the account. Said notice shall also set forth that all parties whose claims are disputed or objected to must appear at said time and place and prove their claims or be debarred from coming in upon the fund for distribution.

Section 49. Expenses to Be Paid Out of Fund.—All assessments, charges, and penalties due to the department by such corporation or person, all ex-

penses of the taking and maintaining possession of the business and property or the continuing of the business by the secretary, and all expenses of liquidation under the provisions of this act, shall first be payable out of the funds of such corporation or person, including the compensation of special deputies, assistants, and others employed by the secretary to assist him in such proceedings; the allowance of all such expenses to be subject to the approval of the court.

Section 50. Distribution of Balance—Liquidating Trustees.—If, after the filing and confirmation of the final account of the secretary and the payment of all creditors in full, and the return to stockholders, who have paid to the secretary the amounts demanded pursuant to section thirty-seven of this act, of their pro rata shares of any such amounts not necessary to pay creditors in full, there shall remain a balance in the hands of the secretary, he shall call a meeting of the stockholders by serving written or printed notice upon them at least thirty days before the day fixed for the meeting.

At such meeting, the stockholders shall elect by ballot a trustee or trustees for the purpose of completing the liquidation. A majority of the stock present in person or by proxy shall be necessary to elect. Should the stockholders fail or refuse to elect, the secretary or any stockholder may petition the court for the appointment of such trustee or trustees, who when appointed, shall give bond to the Commonwealth in such amount, with such surety, and on such conditions, as the court may direct.

When such trustee or trustees have been duly elected or appointed as aforesaid, the secretary shall then transfer, convey, and deliver to such trustee or trustees all the assets of the corporation then remaining his hands. He shall thereupon be discharged from all further liability to such corporation and its creditors, and shall file a certified copy of the proceedings of said stockholders' meeting in his office, and cause a certified copy thereof to be filed in the office of the prothonotary. No powers subject to the supervision of the department shall thereafter be exercised by such corporation, except by permission of the secretary, and after compliance by such corporation with all the requirements of law as to a new corporation desiring to exercise such powers.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1934. No. 394

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

JOHN G. WILLIAMS, JOSEPH B. SIMON and CHARLES DENBY, JR., Receivers of MORTGAGE BUILDING AND LOAN ASSOCIATION,
Respondents.

Brief for Respondents.

(CONTRA PETITION FOR WRIT OF CERTIORARI.)

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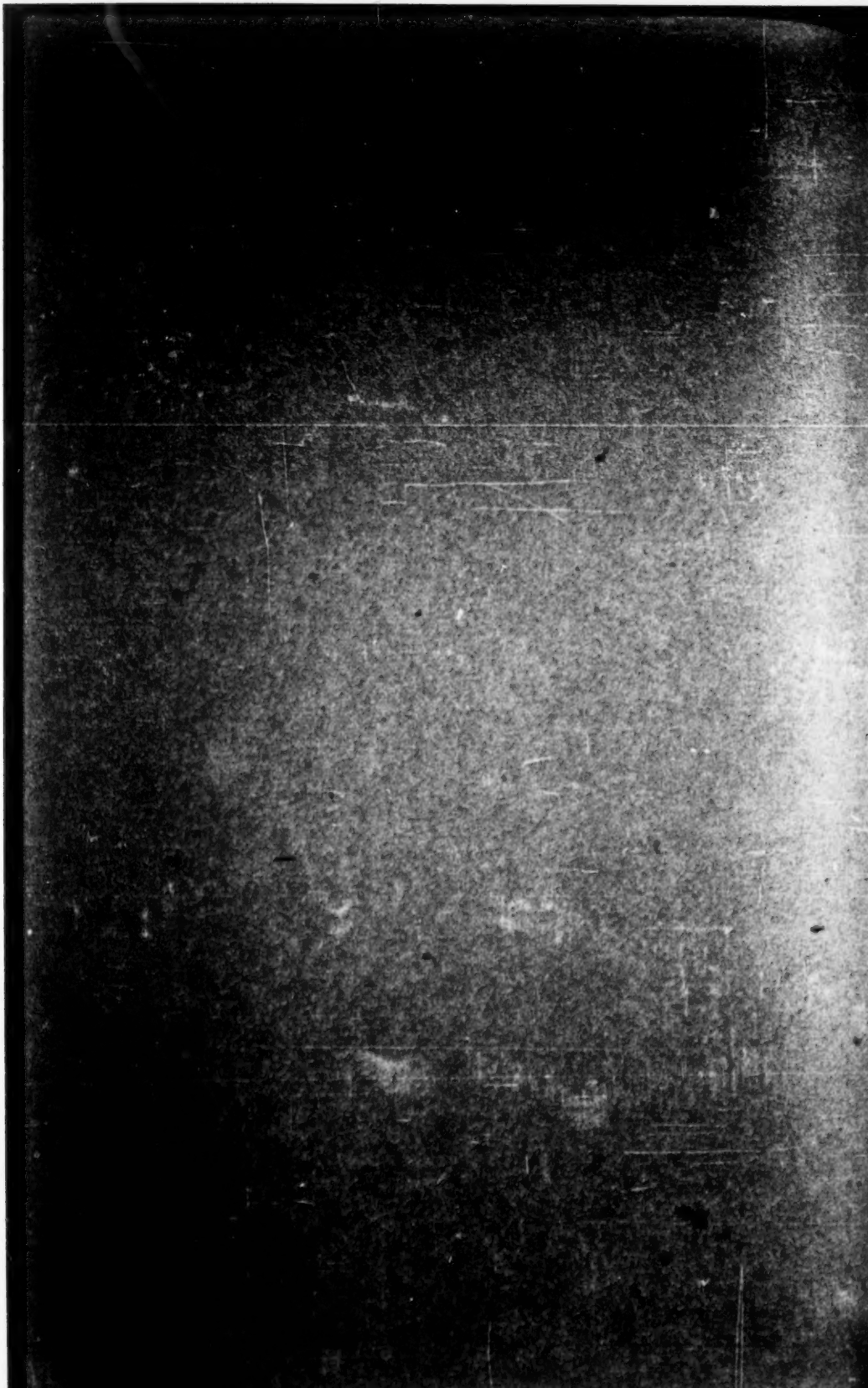

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BRIEF FOR RESPONDENTS.

ARGUMENT.

I.

The Facts.

The facts appearing in the Petition for Writ of Certiorari and in petitioner's Brief in support thereof so distort the facts appearing in the Record, that a succinct but accurate restatement is essential.

Mortgage Building and Loan Association was created on April 7, 1931, by the merger and consolidation of seven associations (R. 32). As early as June 5, 1931, within two months after this merger, the Department of Banking summoned the officers of the association for a hearing before it. At that hearing the Attorney General and the Department found the association to be in an unsafe and unsound condition (R. 32, 42). Thereupon, on the same day, the Secretary of Banking addressed a letter to the president of the association, referring to the hearing and stating:

> "We gave certain instructions as to how the association is to be operated in the future, which instructions we feel if strictly adhered to will be for the best interest of the stockholders and may work out its salvation.
>
> "The instructions are as follows:
>
> [Here follow the instructions or recommendations.]
>
> . . . . . .
>
> "The above instructions are to be strictly adhered to until the association is again examined by this Department, which will be sometime after the first of

the year" (—a period of at least seven months) (R. 42-6).

The Secretary of Banking therefore knew on June 5, 1931, that the association was in an unsafe and unsound condition; he knew for sometime prior to December 6, 1932 (Exhibit "B" of Petition, R. 46-50) that the association was insolvent.

In the face of these facts, the almost total want of reference in petitioner's Brief to the claim of Nice Ball Bearing Company is of striking significance. It is that claim which gave rise to the receivership and was its motivating cause. The Bill of Complaint (Paragraphs 17-19, R. 15-16), as well as the Answer to the Petition, shows that the Secretary of Banking, through his agent, the Chief of the Bureau of Building and Loan Associations, knew that the filing of the Bill of Complaint in this case was imminent and that the solicitor and real estate advisor conferred with the officials of the Department, advising them that liquidation was inevitable and the Department should take possession.

The Record shows that the Bill of Complaint was filed solely because a dissenting shareholder, Nice Ball Bearing Company, had obtained a judgment against the association on May 7, 1932, for $40,044, and that this judgment had been affirmed on appeal on January 16, 1933 by the Supreme Court of Pennsylvania. (Reported as *Nice Ball Bearing Co. v. Mortgage Building and Loan Association*, 310 Pa. 560, 166 A. 239 (1933).)

Nice Ball Bearing Company was threatening and was about to issue execution whereby it would obtain a preference over all other shareholders including the plaintiff, who was also a dissenting shareholder and who had paid in to the association as dues the total sum of $31,200. This preference, so sought to be obtained by Nice Ball Bearing Company, was only to be avoided by the application for

receivers, which was made in this case (R. 57). Once execution had issued in favor of Nice Ball Bearing Company, it would have obtained an unshakable lien on the property levied upon, for the amendment to the bankruptcy law exempts building and loan associations from its operation (Act of February 11, 1932, c. 38, 47 Stat. 47). What would have happened if the receivership had not been effected upon plaintiff's Bill appears from a subsequent proceeding referred to in the Opinion of the Circuit Court of Appeals (R. 111). After the receivership Nice Ball Bearing Company filed a petition seeking to have the receivers turn over to it United States Liberty Bonds in excess of $40,000, which had been placed in escrow by the association at the time of its appeal to the Supreme Court of Pennsylvania from the judgment of Nice Ball Bearing Company. The Circuit Court of Appeals sustained the action of the District Court in refusing a peremptory order to turn over the bonds (see *Nice Ball Bearing Co. v. Williams, et al.*, 66 F. (2d) 881 (1933)).

Accordingly, the Bill of Complaint was filed more than three weeks after the affirmance by the Supreme Court of Pennsylvania of the judgment obtained by Nice Ball Bearing Company. During all this time the state officials took no steps to bring the association under the jurisdiction of the Department of Banking, although they had been requested to do so. Then only was the Bill of Complaint filed.

Temporary receivers were not appointed without notice of any kind. The decree of the District Judge appointing Temporary Receivers (R. 20) itself recites:

> "Notice of said application having been given to the attorney for the Mortgage Building and Loan Association, and Joseph H. Sundheim, Esq., appearing and not objecting to said appointment of Temporary Receivers. . . ."

It is conceded that the Bill was filed, the receivers appointed and all the property of the association taken into their actual custody before the Secretary of Banking held his hearing preliminary to the filing of his certificate of possession.

Some improper inference is sought to be created with respect to the identity of one of the receivers and one of counsel (Petitioner's Brief, p. 19). The receiver named, Mr. Williams, had been designated by the association as real estate officer pursuant to the letter of the Department of June 5, 1931, which required approval by the Department of such choice. No assertion has ever been made to the District Judge appointing the receivers of any disqualification of the officers acting under its decree.

It is true the District Court refused leave to the Commonwealth to intervene and dismissed its Petition, but it is to be noticed that the one Petition went also to the substance of the present proceeding. Indeed, the present proceeding is based upon that Petition. The District Judge and the Circuit Court of Appeals alike refused leave to intervene only because they considered the petitioner as having already intervened and disposed of its Petition upon its merits. As said by the District Judge:

> "Upon consideration of the whole Record, we are of the opinion that no sufficient grounds have been shown to vacate the court's appointment of the receivership, and since this is the only purpose for which the petition to intervene has been filed, the petition filed by the Attorney General is dismissed." (R. 81)

Indeed, petitioner received more than it was entitled to at the hands of both courts. For as pointed out by the District Judge (R. 66), the Commonwealth of Pennsylvania was not the proper party and the Petition should have been brought by Richard Ennis, Special Deputy Secretary of

Banking appointed by the Secretary to take possession of the association. These procedural questions were waived, however, by the receivers, and both courts, as the Opinions show, considered the Petition upon its merits.

It is asserted in petitioner's Brief (p. 20) that the Circuit Court of Appeals "did not recognize any distinction in receivership applications for ordinary commercial corporations and those of a quasi public character." The Opinion of the Circuit Court of Appeals shows precisely the opposite (R. 96-7, 109-10).

II.

The Secretary of Banking Was Not Exercising Jurisdiction Over the Association.

The statute applicable to the present case is the Banking Act of June 15, 1923, P. L. 809 (7 PS., Sections 1, et seq.). The present Department of Banking Code, approved May 15, 1933 (P. L. 565) and effective July 3, 1933, is a codification, restatement and alteration of the law. It was not in force, however, when the present proceedings were taken and hence is inapplicable here. An examination of the statutory law clearly reveals that prior to the Department of Banking Code of 1933 the method prescribed was loose and incomplete; and doubtless the Code and its companion Building and Loan Code of 1933 (P. L. 457), were enacted as a result of the deficiencies in the prior statutes.

The Opinion of the District Judge refers at length to the applicable statutory provisions and they need not be repeated here. It should be pointed out, however, that the Banking Act of 1923, which authorized the Secretary of Banking to take possession of an association for the purpose of liquidation (7 PS., Sections 21-31), and provided that upon such possession he shall supersede a receiver appointed "by any court", refers to a Court of Common

Pleas of the Commonwealth of Pennsylvania (7 PS., Section 2), and not to a federal court.

Petitioner is driven to the anamolous argument that under the statute of Pennsylvania to which it points, the Secretary of Banking could have taken possession of the association as early as June 5, 1931, yet failed to do so until the futile effort made after the appointment of receivers by the federal Court. At the same time it argues that this inactivity and non-exercise of statutory power constitutes an exercise of "full jurisdiction over the liquidation of the association" (Petitioner's Brief, p. 20). From its own Petition it appears that the Secretary of Banking did nothing until October 28, 1932, fifteen months later, when he requested a financial report, and on December 6, 1932, advised the association's officers that it was insolvent. This was all he did other than to suggest a method of operation, to select new counsel and a real estate advisor and to have the directors approve the various actions which he suggested (Petition, paragraphs 10-12, R. 33-4, 46-50).

He never exercised any authority or dominion over the association, never received one of its papers or documents into his possession or put them under his control, but permitted it to function as any other corporation in Pennsylvania and as if it were a solvent association, leaving control entirely in the hands of its officers and directors.

As is well said by the Circuit Judge:

> "The association continued to go along and conduct business on this restricted basis while insolvent or in an unsafe and unsound condition from June 5, 1931, until the Bill in this case was filed, February 9, 1933, when it was admittedly insolvent, with the interests of all persons who dealt with it or who were connected with it, in jeopardy" (R. 111).

What the Secretary should have done, and what alone would have constituted "full jurisdiction" over the liquidation of the association, was to take possession both because it was unsafe and unsound and because it was insolvent.

Much emphasis is placed upon the suggestions, letters or so-called orders from the Secretary of Banking. As shown by the District Judge, they constitute mere admonitions and do not rise to the dignity of restraining orders. In fact they have no legal force except that their compliance may create an attitude of good-will, causing the Secretary of Banking to refrain from the exercise of his legal powers. This principle has been recognized in Pennsylvania. In *Blattenberger v. Sharswood Bldg. & Loan Assn.*, 19 Pa. D. & C. 447 (1933), the Department of Banking notified the association as to the manner in which it should conduct its business and placed it under "temporary restrictions" under which, inter alia, it was to pay no withdrawals and declare no maturities. The court held these letters merely directory and not binding, saying:

> "Section 20 of The Banking Act of June 15, 1923, P. L. 809, provided that 'Whenever it shall appear to the secretary that any corporation . . . is conducting business in an . . . unsafe manner, or that any such corporation has an impairment of capital, the secretary may issue an order, under his hand and seal of office, directing such corporation . . . to discontinue . . . such unauthorized or unsafe practices, or directing such corporation to make good, within a time of not more than sixty days after notice by the secretary, any impairment or deficiency of capital'. The letters from the secretary above referred to were not under his 'seal of office'. Indeed, they were not signed by him but by the assistant supervisor. They were not orders but merely requests. The defendant was not

directed 'to make good . . . any impairment or deficiency of capital.' True, that of April 8, 1933, states that 'within sixty days you are to submit to this office a plan for rehabilitation of your affairs', but submitting such a plan is not making good an 'impairment or deficiency of capital'. The letters referred to no 'unauthorized or unsafe practices', but to the regular and proper acts of a building and loan association in the conduct of its business. Upon these the secretary was attempting to place 'temporary restrictions'. Under section 808 of the Building and Loan Code of May 5, 1933, P. L. 457, he now may do so by issuing an 'order of segregation', but no such authority was vested in him prior to July 3, 1933, when that act became effective. It is therefore apparent that the letters had no legal significance, and that defendant should have credited plaintiff's payments on account of his shares of stock to the cancellation of his loan."

The letters in this case are similar in form and were equally unauthorized in law.

Had the Secretary been exercising full jurisdiction over the association, there would have been no power in the Nice Ball Bearing Company to proceed with execution (7 PS., Secs. 29, 36) and there would accordingly have been no need for the filing of the present Bill. It may be, as petitioner argues (Brief, p. 21), that "nowhere in the Bill of Complaint is it charged that the Secretary of Banking was guilty of neglect or delay in performing his duty." The answer to this assertion, however, is that the admitted facts proclaim his neglect. The Secretary's own Petition reveals inactivity over a long period of time, rendering possible the consummation of the threatened attachment by Nice Ball Bearing Company and an unwillingness to meet this threat which was only frustrated by the filing of the Bill.

III.

The District Court Had Jurisdiction to Appoint Receivers to Liquidate the Association.

It is argued by petitioner that the District Court is without jurisdiction to appoint receivers to liquidate a building and loan association. This argument, which is but feebly pressed here, is fully answered in the Opinions of the District Judge (R. 66-73) and the Circuit Court of Appeals (R. 92-110). It would serve no useful purpose to reiterate what is so thoroughly and convincingly shown in these Opinions.

A fresh error appears, however, in the Petitioner's Brief (p. 24). It is there said that if the Bill had been filed in a Pennsylvania Court "only the Secretary could be made receiver. (Section 22 of the Act of 1923)." *This is not so.* The courts of Pennsylvania had complete power to make unrestricted choice of receivers; the only limitation thereon was the subsequent one that the Secretary of Banking might, on account of the appointment of a receiver, or for any other cause mentioned in the statutes, take possession of the association, and upon so doing, *superseded the receiver appointed by the state court* (7 PS., Section 21.). This was the law in existence at the time the present proceedings arose. It has recently been changed by the Department of Banking Code of 1933, Sec. 606, which provides:

> "No court shall appoint anyone but the Secretary [of Banking] as receiver of an institution. Whenever any court . . . shall determine that a receiver should be appointed . . . it shall appoint the Secretary as such receiver."

It is erroneously argued that the two courts which have already passed upon this case adversely to the peti-

tioner, failed to consider its argument that jurisdiction to appoint receivers does not attach where the subject of the receivership is a quasi public corporation. A reading of the Opinions reveals that they are chiefly concerned with this argument and that contrary to petitioner's assertion, judicial authority exists in which it has been ruled that the *jurisdiction* of federal Courts over quasi public institutions is not ousted or limited.

Indeed, the Opinion of the Circuit Court of Appeals reveals that petitioner there conceded that the court had jurisdiction, and limited its attack to the exercise of jurisdiction as an abuse of discretion. Judge Davis said:

> "The Attorney General . . . virtually admits that the District Court did have jurisdiction, but ought not to have exercised it, for he says, 'We are urging not that the District Court was technically without jurisdiction, but that it ought not to have exercised its jurisdiction' " (R. 110).

IV.

THE FEDERAL COURT WAS COMPELLED TO EXERCISE JURISDICTION TO LIQUIDATE THE ASSOCIATION.

Petitioner argues that even if the District Court had jurisdiction to appoint the receivers, it would have been an abuse of discretion to do so "*under the circumstances*". This argument, however, becomes indistinct, for it merges in the argument that federal Courts must, in deference to State statutes, decline to take control of quasi public institutions. This raises the question of *jurisdiction* rather than *discretion*. The former has already been considered.

Accordingly, we shall here restrict ourselves to the question of discretion. The circumstances already recited

make it evident that it would rather have been an abuse of discretion if the District Judge had refused to appoint receivers. Under the unusual circumstances present in this case, the assertion that it was an abuse of discretion to appoint receivers is so extreme that to accept it as sound would be in effect to hold that there is no jurisdiction in any case to appoint receivers. It may therefore be understood why petitioner's argument on discretion is so indistinct from its argument on power. No stronger appeal to the discretion of a court could be made than that presented by the plaintiff in this case. He appealed to the District Court under the Federal Constitution to extend to him as a resident of New York its power of supervising and liquidating a Pennsylvania corporation through the instrumentality of a receivership in order to save the corporation in which he had a large financial interest from imminent destruction which the State authorities had long indicated they would not act to prevent.

Without further discussion, we submit that it is clear that petitioner cannot carry the heavy burden of showing a clear abuse of discretion, yet such is the burden upon it. In *Milwaukee and Minnesota Railroad Co. v. Howard*, 131 U. S. Appdx. lxxxl, (1866), this Court said:

> "The removal or appointment of a receiver, as we have heretofore said, rests in the sound discretion of the Court *and is not reviewable here.*"

In *Kingsport Press, Inc. v. Brief English Systems, Inc.*, 54 F. (2d) 497 (1931), (certiorari denied, *Owen v. Kingsport Press*, 286 U. S. 545, 1932), the facts were so similar to those in the present case, that we set them forth at some length. The United States District Court for the Southern District of New York appointed an equity receiver of the defendant. Thereupon a creditor of the de-

fendant, who prior to the receivership had obtained a judgment and had allowed an appeal to be taken without the entry of security on the assurance of the defendant's then counsel that it was solvent, presented a petition to vacate the appointment of the receiver. The petitioner objected that the plaintiff's claim had not been reduced to judgment, that the suit was collusive and that its sole purpose was to prevent execution by petitioner.

On appeal Augustus N. Hand, of the Circuit Court of Appeals for the Second Circuit, after considering *Harkins v. Brundage,* 276 U. S. 36 (1928), cited by appellant as requiring the plaintiff to be a judgment creditor, said:

> "In most cases the estate can and should properly be administered in bankruptcy . . . In other words, we assume that the above dictum [in the Harkins Case] did not mean to prescribe the appointment of a receiver in equity for a railroad (which would not be subject to the Bankruptcy Act [11 U. S. C. A.]) or even for an industrial corporation, where it was made to appear that the corporation was likely to pay its creditors in full and to preserve its business through administration by a receiver, whereas the interests of general creditors would be greatly injured or destroyed if a single creditor were allowed to proceed with execution . . . Nor was the complainant here a mere dummy acting without risk of expense. On the contrary, it acted on its own behalf and through its regular attorneys and was vitally interested in not having the assets seized on execution by a judgment creditor who would get his claim paid in full while other creditors might have to go begging. In such circumstances, there can be no reason for holding that the judge abused his discretion in appointing a receiver or that the complainant was guilty of any fraud upon the judgment creditor, Owen, or upon the

court. The judge, on the facts presented, adopted the only course that seemed to give the creditors of the defendant a chance to be paid in full or, even if they should not be paid in full, to be treated equally. . . . We should not interfere with the exercise of that discretion in the absence of proof of abuse. Sage v. Memphis, etc., Railroad Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. Ed. 694; Folk v. United States (C. C. A.) 233 F. 177; Ward v. Central Trust Co. of Illinois (C. C. A. 252 F. 127; City Bond & Finance, Inc., v. Grant (C. C. A.) 30 F. (2d) 671.

• • • • • • • • •

The contention that the appointment was obtained by collusion is based on a confusion of ideas. It seems to be thought that it was illegal for the defendant to inform the complainant that Owen was ready to issue execution or to take any steps that would facilitate a receivership. We can discover nothing illegal in this. Owen had no vested right to prevent other creditors from being paid if an administration of the property of the defendant through an equity receivership would produce such a result though after some inconvenience and delay to himself."

In *First National Bank of San Francisco v. Detroit Trust Co.*, (C. C. A. 9th) 248 Fed. 16 (1918), it was said:

"It is to be observed that an appellate court will not reverse such an order as that which is here appealed from [the appointment of a receiver and authority to continue the business] unless it appears that the discretionary power of the court 'has been so improvidently and improperly exercised as to bring its action clearly within the meaning of the term "abuse of power".' Heinze v. Butte & Boston Consolidated Min. Co., 126 Fed. 1, 11, 61 C. C. A. 63, 73; United

States Shipbuilding Co. v. Conklin, 126 Fed. 132, 60 C. C. A. 680; Briggs v. Neal, 120 Fed. 224, 56 C. C. A. 572."

This is the law in Pennsylvania.

In *Franklin National Bank v. Kennerly Coal & Coke Co.*, 300 Pa. 479, 150 A. 902 (1930), the Court states:

> "The appointment of a receiver is a discretionary matter with the court below, and its action will not be disturbed unless there is a clear abuse of sound judicial discretion."

As a matter of law, such an appointment was not appealable in the federal Courts until the passage of the Act of April 14, 1906, 34 Stat. at L. 116 (now contained in Sec. 129 of the Judicial Code, 28 U. S. C. A. Sec. 227). See *Loveland's Appellate Federal Jurisdiction*, Secs. 187, 193.

It is further argued that federal Courts, in deference to State statutes, have in the past and presumably should now decline to take control of quasi public institutions. The Opinion of Judge Welsh has set forth an imposing list of cases in which federal Courts have appointed receivers for building and loan associations (R. 71-2). Petitioner cites a number of cases, but they have all been so carefully considered by the District Judge and the Circuit Court of Appeals and shown to be so clearly inapplicable to the present case that to avoid repetition we refer to the discussion of the cases in the two Opinions. Most of these cases were cited in the Opinion of the Pennsylvania Supreme Court in *Commonwealth v. Penn General Casualty Company* (not yet reported). That Opinion and its erroneous reliance upon these cases is thoroughly discussed in the Opinion of the Circuit Court of Appeals (R. 99-109). As pointed out by Judge Davis, the Pennsylvania Supreme Court did not refer to *Mitchell v. Maurer*, 69 F. (2d) 233

(1934), where the Insurance Commissioner of California sought to supersede federal receivers of an insurance company. It was there held that since the federal receivers had taken possession of the res before the Insurance Commissioner had brought his proceeding, the federal receivership must continue.

Petitioner has added the case of *Amos v. Trust Company of Florida,* 54 F. (2d) 286 (1931). In that case the Court pointed out that under the facts there existing, the federal Court, as a matter of discretion, should not have appointed receivers. Again, the receivership granted was not of the assets of the company but of only a certain portion of its business which, however, would destroy the remaining business of the company. Hence, it was an abuse of discretion to invoke a receivership which in effect destroyed the remaining business of the trust company.

Petitioner does not refer to *Jones v. Lincoln Savings & Trust Co.,* 222 Pa. 325, 71 A. 209 (1908). In that case a receiver of a trust company was appointed on a shareholders' bill in the Common Pleas Court of Philadelphia County. Thereafter at the instance of the Attorney General under a bill for dissolution under the Act of February 11, 1895, P. L. 4, a receiver was appointed in the Dauphin County Court. The Attorney General sought to have this receiver supersede the receiver appointed on the stockholders' bill. The refusal of this prayer was affirmed by the Supreme Court of Pennsylvania. It probably was in consequence of this case that the Act of April 23, 1909, P. L. 167, was passed providing that the appointment of a receiver "by any court of this Commonwealth" should be cause for the superseding of that receiver on application by the Attorney General.

V.

CONCLUSION.

It is argued by petitioner that the decision of the Circuit Court of Appeals in effect assists a building and loan association to escape the jurisdiction and laws of the state creating it. This argument comes far too late for it has found organic expression in the Constitution of the United States in cases of diversity of citizenship (Art. III, Sec. 2). Nowhere in the Record can be found a single fact which supports the argument that to permit liquidation of a building and loan association under the jurisdiction of a federal Court will result in the destruction of its assets and the ruin of its shareholders. Surely it would be a novel thing for this Court to judicially notice as true an argument which on its face must prove unsound and a reflection upon the federal Courts. The petitioner, however, should have descended from such a generality to this particular case. The conduct of the state officials can in no way be justified and that unjustifiable conduct alone made necessary and possible the appointment of Federal receivers. The proper method of avoiding federal receivership of a building and loan association is not to destroy a constitutional jurisdiction but for state officials to comply with the laws which they administer. If, under the laws existing when these proceedings arose, the Secretary of Banking had taken possession of unsafe and unsound or insolvent associations there could be no federal receivership. If his neglect of the power conferred upon him has resulted in administration through some other agency, he cannot complain.

The entire fallacy of petitioner's argument rests in its failure to recognize that under the Act of 1923 and similar legislation, the Secretary's power of supervision was not an exercise of possession or jurisdiction over building and loan associations. It is quite probable that

the Building and Loan Code of 1933, which provides for orders of segregation (Section 808) is legislative recognition of the prior error entertained by the Department of Banking. Under the new law the Secretary of Banking is given intermediate jurisdiction over associations, even short of the taking of possession. His orders in such cases may not be, as heretofore, mere words of advice which in practice an insolvent association would feel impelled to follow but which a sound and solvent association might legally defy. If this be true, then such intermediate orders, made in the future, may prevent federal receivership in all such cases because the res will have been already in the possession of the state.

But it is well that non-residents should know that the jurisdiction of federal Courts is still available to them. To use the illustration of a bank or trust company, which petitioner seems to believe is so conclusive in its favor, is there any public policy which should destroy the jurisdiction of federal Courts in a case where the state agency negligently refuses to take possession of a bank or trust company which for almost two years has been insolvent? If the state authorities should for any reason be unwilling for two years to close the doors of an insolvent bank, it is well that federal Courts have the power to intervene and do so themselves.

It comes with ill grace for petitioner to speak of "technically non-resident shareholders" as "mere pawns for professional receivership practitioners". The plaintiff in this case is admittedly a non-resident and had invested $31,200. in the association which the state agencies did not properly protect. Vigilance, activity and performance of duty by the Secretary of Banking would have rendered a federal receivership unnecessary. Such action likewise would not have made it necessary for him to indulge in the impropriety of making assertions outside the Record. Had he taken possession it would have rendered unneces-

sary the exercise of constraint upon the association in the choice of its solicitors and real estate agents by the threat of possession.

It is submitted that this case involves, not high questions of public policy, but a very common illustration of an attempt to alter well established law to justify administrative inactivity and neglect.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1934. No. 394.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

JOHN G. WILLIAMS, JOSEPH B. SIMON and CHARLES DENBY, JR., Receivers of MORTGAGE BUILDING AND LOAN ASSOCIATION,
Respondents.

SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS.

Since preparation of the Respondents' Brief in this case, the Supreme Court of the United States on Monday, October 8, 1934, handed down a decision upon Petition for Writ of Certiorari in the case of Mitchell v. Maurer (69 F. (2d) 233 (1934)), in which case the same question was raised and allowing an appeal, limiting it to the question of whether the appointment of an ancillary receiver upon the petition of a domiciliary receiver was proper; in other words, apparently dismissing the appeal on jurisdictional grounds.

In that case it refers to the case of McCandless v. Furlaud (68 F. (2d) 925 (1934)) which is No. 11 on the Argument List and is to be argued today (October 11, 1934). It would seem, therefore, that the question involved in this case was disposed of in that case by not allowing the appeal on the question of jurisdiction.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934. No. 394.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

JOHN G. WILLIAMS, JOSEPH B. SIMON, and CHARLES DENBY, Jr., Receivers of MORTGAGE BUILDING AND LOAN ASSOCIATION.

BRIEF FOR RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934. No. 394.

Commonwealth of Pennsylvania,
Petitioner,

v.

John G. Williams, Joseph B. Simon, and Charles Denby, Jr.,
Receivers of Mortgage Building and Loan Association.

BRIEF FOR RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

This case comes before the Court on Writ of Certiorari issued to review a decree of the Circuit Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania, delivered by Judge Welsh on June 17, 1933, is reported as *Elson* v. *Mortgage Bldg. & Loan Assn.*, 1 F. Supp. 779.

The opinion of the Circuit Court of Appeals for the Third Circuit, delivered by Judge Davis on July 24, 1934, is reported as *Commonwealth of Pennsylvania* v. *Williams, et al*, 72 F. (2d) 509.

COUNTER-STATEMENT OF CASE.

The facts appearing in the Petition for Writ of Certiorari and in petitioner's Brief so inadequately present the statement of the case, that a succinct and accurate counter-statement is essential.

Mortgage Building and Loan Association was created on April 7, 1931, by the merger and consolidation of seven associations (R. 20-1). As early as June 5, 1931, within two months after this merger, the Department of Banking summoned the officers of the association for a hearing before it. At that hearing the Department found the association to be in an unsafe and unsound condition (R. 21). Thereupon, on the same day, the Secretary of Banking addressed a letter to the president of the association, referring to the hearing and stating:

> ". . . We gave certain instructions as to how the association is to be operated in the future, which instructions we feel if strictly adhered to will be for the best interest of the stockholders and may work out its salvation.
>
> "The instructions are as follows:
>
> [Here follow the instructions or recommendations.]
>
> . . . . . .
>
> "The above instructions are to be strictly adhered to until the association is again examined by this Department, which will be sometime after the first of the year." (—a period of at least seven months) (R. 28-31).

The Secretary of Banking therefore knew on June 5, 1931, that the association was in an unsafe and unsound condition; he knew for sometime prior to December 6, 1932 (Exhibit "B" of Petition, R. 31 *et seq.*) that the association was insolvent.

In the face of these facts, the almost total want of reference in petitioner's Brief to the claim of Nice Ball Bearing Company is of striking significance. It is that claim which gave rise to the receivership and was its motivating cause. The Bill of Complaint (Paragraphs 17-19, R. 10-11), as well as the Answer to the Petition (R. 39), show that the Secretary of Banking, through his agent, the Chief of the Bureau of Building and Loan Associations, knew that the filing of the Bill of Complaint in this case was imminent and that the solicitor and real estate advisor conferred with the officials of the Department, advising them that liquidation was inevitable and the Department should take possession.

The Record shows that the Bill of Complaint was filed solely because a dissenting shareholder, Nice Ball Bearing Company, had obtained a judgment against the association on May 7, 1932, for $40,044, and that this judgment had been affirmed on appeal on January 16, 1933, by the Supreme Court of Pennsylvania (Reported as *Nice Ball Bearing Co.* v. *Mortgage Building and Loan Association, 310 Pa. 560, 166 A. 239 (1933)).*

Nice Ball Bearing Company was threatening and was about to issue execution whereby it would obtain a preference over all other shareholders, including the plaintiff, who also was a dissenting shareholder and who had paid in to the association as dues the total sum of $31,200. This preference, so sought to be obtained by Nice Ball Bearing Company, was only to be avoided by the application for receivers, which was made in this case (R. 11, 39). Once execution had issued in favor of Nice Ball Bearing Company, it would have obtained an unshakable lien on the property levied upon, for the amendment to the bankruptcy law exempts building and loan associations

from its operation (Act of February 11, 1932, c.38, 47 Stat. 47). What would have happened if the receivership had not been effected upon plaintiff's Bill appears from a subsequent proceeding referred to in the Opinion of the Circuit Court of Appeals (R. 78-9). After the receivership Nice Ball Bearing Company filed a petition seeking to have the receivers turn over to it United States Liberty Bonds in excess of $40,000, which had been placed in escrow by the association at the time of its appeal to the Supreme Court of Pennsylvania from the judgment of Nice Ball Bearing Company. The Circuit Court of Appeals sustained the action of the District Court in refusing a peremptory order to turn over the bonds (see *Nice Ball Bearing Co.* v. *Williams, et al., 66 F. (2d) 881 (1933)).*

Accordingly, the Bill of Complaint was filed more than three weeks after the affirmance by the Supreme Court of Pennsylvania of the judgment obtained by Nice Ball Bearing Company. During all this time the state officials took no steps to bring the association under the jurisdiction of the Department of Banking, although they had been requested to do so. Then only was the Bill of Complaint filed.

Temporary receivers were not appointed without notice of any kind. The decree of the District Judge appointing Temporary Receivers (R. 13), itself recites:

> ". . . Notice of said application having been given to the attorney for the Mortgage Building and Loan Association, and Joseph H. Sundheim, Esq., appearing and not objecting to said appointment of temporary receivers. . . ."

It is conceded that the Bill was filed, the receivers appointed and all the property of the association taken into their actual custody before the Secretary of Banking held his hearing preliminary to the filing of his certificate of possession.

Some improper inference is sought to be created with respect to the identity of one of the receivers, and one of counsel

(Petitioner's Brief, pp. 5-6). One of the receivers named, Mr. Williams, had been designated by the association as real estate officer pursuant to the letter of the Department of June 5, 1931, which required approval by the Department of such choice. He had had no previous connection with the association. Messrs. Simon and Denby were complete strangers to the association at the time of their appointment as receivers. No assertion has ever been made to the District Judge appointing the receivers of any disqualification of the officers acting under its decree.

It is true the District Court refused leave to the Commonwealth to intervene and dismissed its Petition, but it is to be noticed that the one Petition went also to the substance of the present proceeding. Indeed, the present proceeding is based upon that Petition. The District Judge and the Circuit Court of Appeals alike refused leave to intervene only because they considered the petitioner as having already intervened and disposed of its Petition upon its merits. As said by the District Judge:

> "Upon consideration of the whole record, we are of the opinion that no sufficient grounds have been shown to vacate the Court's appointment of the receivership, and since this is the only purpose for which the petition to intervene has been filed, the petition filed by the Attorney General is dismissed" (R. 58).

Indeed, petitioner received more than it was entitled to at the hands of both Courts. For as pointed out by the District Judge (R. 45-6), the Commonwealth of Pennsylvania was not the proper party and the Petition should have been brought by Richard Ennis, Special Deputy Secretary of Banking, appointed by the Secretary to take possession of the association. These procedural questions were waived, however, by the receivers, and both Courts, as the Opinions show, considered the Petition upon its merits.

QUESTIONS PRESENTED.

1. Is the fact that the defendant in a bill for receivership is a building and loan association, in law an ouster of the general jurisdiction of Federal Courts of equity?

2. Is it an abuse of discretion for a Federal Court, admittedly having jurisdiction, to appoint receivers of an insolvent building and loan association, where another shareholder has obtained judgment in a large sum and is about to issue execution whereby he will secure a preference over other shareholders and even creditors, and the State Secretary of Banking, with knowledge of these facts, has failed to take possession, by which he might have prevented the institution of suits and the issuance of executions?

ARGUMENT.

SUMMARY.

POINT I—THE DISTRICT COURT HAD JURISDICTION TO APPOINT RECEIVERS TO LIQUIDATE THE ASSOCIATION.

(a) *The Position of Petitioner in the Court Below.*

(b) *The Source of Equity Jurisdiction of the District Courts.*

(c) *The Equity Jurisdiction of District Courts is not Curtailed in Cases Involving Building and Loan Associations.*

(d) *The Contract of Subscription does Not Impair Federal Jurisdiction.*

POINT II—THERE WAS NO ABUSE OF DISCRETION IN THE APPOINTMENT OF RECEIVERS.

(a) *The Secretary of Banking was Not Exercising Jurisdiction over the Association.*

(b) *The District Court was Compelled to Exercise its Jurisdiction to Appoint Receivers.*

POINT III—CONCLUSION.

POINT I.

THE DISTRICT COURT HAD JURISDICTION TO APPOINT RECEIVERS TO LIQUIDATE THE ASSOCIATION.

(a) *The Position of Petitioner in the Court Below.*

It is argued by petitioner that the District Court is without jurisdiction to appoint receivers to liquidate a building and loan association. This argument is but feebly pressed here. Indeed, the Opinion of the Circuit Court of Appeals reveals that the petitioner there conceded that the Court had jurisdiction and limited its attack to the *exercise* of jurisdiction as an *abuse of discretion.* Circuit Judge Davis said:

> "The Attorney General . . . virtually admits that the District Court did have jurisdiction, but ought not to have exercised it, for he says: 'We are urging, not that the District Court was technically without jurisdiction, but that it ought not to have exercised its jurisdiction'." (R. 77-8)

Having failed to press want of jurisdiction in the Court below, it comes with ill grace for petitioner to advance it, however formally, in this Court. The universal principle which requires fairness to Courts below, is recognized in this Court as well as in Pennsylvania, and it is held that a litigant may not change his theory upon appeal.

> *Texas and Pacific Railway Company* v. *Abilene Cotton and Oil Company, 204 U. S. 426 (1907),*
> *Consolidated Cigar Corp.* v. *Corbin, 285 Pa. 273, 132 A. 364 (1926).*

We shall, however, note briefly the jurisdictional authority of the District Court to appoint receivers of a building and loan association.

(b) *The Source of Equity Jurisdiction of the District Courts.*

The jurisdiction of the Federal Courts is derived from Article III, Section 2 of the Constitution of the United States, which provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States . . . ;—to Controversies . . . between citizens of different States . . ."

Congress has executed this organic law by establishing District Courts and by Section 24 of the Judicial Code (28 U. S. C. A. 41 (1)) has conferred upon them original jurisdiction:

> "First, Of all suits of a civil nature, at common law or in equity, . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and . . . is between citizens of different States . . ."

On this broad and comprehensive foundation rests the equity jurisdiction of Federal Courts. Within the range of this broad grant of power is clearly comprehended the jurisdiction exercised by the District Court in this case. Unless there be found elsewhere some plain limitation upon this power, the petitioner's argument must necessarily fall.

(c) *The Equity Jurisdiction of District Courts is not Curtailed in Cases Involving Building and Loan Associations.*

We read petitioner's Brief in vain to find a single final authority, statutory or judicial, in which the unlimited jurisdiction conferred by the Act of Congress, pursuant to constitutional authority, upon the equity powers of District Courts has been in any way modified or curtailed. Petitioner's argument must, therefore, descend from the realm of law to that of mere controversy. It argues not that the law has limited this jurisdiction of District Courts, but that it would be well for this Court now to engraft such a limitation and pronounce it as a matter of policy.

The Opinions of the District Court and of the Circuit Court of Appeals present an overwhelming array of authoritative decisions which, in discussing the federal equity jurisdiction, place it upon a broad and unrestricted plane. This jurisdiction,

derived as it is from the federal sovereignty, is of course immune from encroachment or restriction by the laws of any State. Petitioner concedes, as it must, the truth of this general principle. It argues, however, that this Court should now declare a limitation upon the federal equity jurisdiction in cases where a receivership is sought of a corporation which is quasi-public in character. Here, too, petitioner points to no federal statute which may afford even a preliminary justification for such an argument, and it concedes, as it must, that a long line of Federal authorities have recognized only a comprehensive and unlimited scope to the Federal jurisdiction.

In *Morrill* v. *American Reserve Bond Co., 151 Fed. 305, 313 (1907)*, Circuit Judge Sanborn said:

> "Wherever citizens of different states lawfully invoke the jurisdiction of the federal courts to determine controversies between them which involve the requisite amounts, they have the constitutional right to the conduct of that litigation by the methods, to the administration of the remedies, and to the determination of those controversies by the independent judgments of those courts; and no state, by conferring exclusive jurisdiction of such issues upon its own courts, by prescribing exclusive methods of commencing or of conducting litigation, by prohibiting the seizure of the subject of the litigation during its pendency, or by any other means, may lawfully strike down that right or take away the plenary power of the national courts to conduct the litigation, to administer their remedies, and in the exercise of their judicial discretion to control the possession of its subject-matter during its pendency in accordance with their established rules of practice, and finally to adjudicate the claims of the parties and to enforce their judgments (Citing many cases)."

To the same effect is *Leadville Coal Company* v. *McCreery, 141 U. S. 475, 477 (1891)*, where the Court said:

> "The Circuit Court takes its jurisdiction not from the State of Ohio, but from the United States; and the

extent of its jurisdiction is not determined by the laws of the State, but by those of the United States. Doubtless, while sitting in the State as a court of the United States, it accepts and gives effect to the laws of the State so far as they do not affect its jurisdiction and the rights of non-resident creditors. It nevertheless exercises powers independent of the laws of the State; and when, in pursuance of the jurisdiction conferred by the laws of the United States, it takes possession of the property of a defendant and proceeds to final decree, determining the rights of all parties to that property, its decree is not superseded and its jurisdiction ended by reason of subsequent proceedings in the courts of the State, looking to an administration of that property in accordance with the laws of the State. It would be an anomaly in legal proceedings if, after a court with full jurisdiction over property in its possession has finally determined all rights to that property, subsequent proceedings in a court of another jurisdiction could annul such decree, and disturb all rights once definitely determined. No such anomaly exists in the relative jurisdiction of state and Federal courts. The latter having once acquired full jurisdiction, and proceeded to a final determination, may rightfully proceed still further and to an execution of that decree, irrespective of any proceedings in the courts of the State."

We have already referred to the significant absence of any authorities in petitioner's Brief to support the distinction which it seeks to draw in the *jurisdiction* of the Federal Courts, as between suits against corporations generally and those against quasi-public corporations. Authority, however, is not wanting in which the general equity jurisdiction of Federal Courts was invoked and applied against quasi-public corporations.

In *New York Trust Co.* v. *Portsmouth & Exeter St. Railway Co., 192 Fed. 728 (1912)*, where a statute of New Hampshire provided that street railways were of public character and the owners could not discontinue them, nevertheless it was

held that where the Federal Court had properly acquired jurisdiction by reason of diversity of citizenship in a foreclosure suit, it could proceed with the foreclosure suit, and dispose of the assets of the company by sale.

In *Straine* v. *Bradford, 88 Fed. 571 (1898)*, where the Federal Court had properly acquired jurisdiction, it was held that even though a receiver was subsequently appointed by the state Court on petition of the Inspector of Finance of Vermont, this did not affect the Federal Court's jurisdiction and it would proceed with its case in the regular way.

A case clearly contrary to petitioner's argument is *Farrell* v. *Stoddard, Superintendent of Insurance of the State of New York, 1 F. (2d) 802 (1924)*. A non-resident, who was endeavoring to impress a trust against certain assets of the Niagara Insurance Company, which had been taken over by the Superintendent of Insurance of the State of New York, in accordance with its statutes, began his proceedings in the Federal Court of New York. The Superintendent of Insurance contested this, on the ground that the non-resident plaintiff must come into the state Court and that the Federal Court had no jurisdiction on the ground of comity because the *res* was already in the custody of the New York state Court in which the possession proceedings had been filed. There are several important principles set forth in this case, and we quote from the Opinion:

> "An examination of section 63 of the Insurance Law of the state of New York makes it clear that the superintendent of insurance is a public officer in the executive department of the state government, and that he still retains his character as a public officer when he acts as liquidator of insurance companies under the provisions of this statute. His power to act as custodian of the *res* comes alone from the statute. The judicial power cannot change or modify this statute, or affect his power in any respect whatever. True, the defendant must first apply to the court for an order to act as liquidator . . . Thereafter the defendant, as the

representative of the executive power, pays no heed to the court or its mandates. His chart is the statute under which he acts. . . .

. . . . . .

"No cases are cited by the defendant in support of his contention that this fund is in the custody of the state court. On the contrary, the defendant substantially conceded that the defendant superintendent of insurance is not a receiver or agent of the court, in his endeavor to have the courts of the state of New York decide that the superintendent of insurance is a representative of the sovereign power of the state, and could not be sued without the consent of the state. . . .

. . . . . .

"The defendant cannot well assert in the state court that he represents an independent branch of the sovereign power not subject to the court's control, and in this court assert he is the agent of the state court, and that his custody is the custody of that court. The fact that the defendant's contentions in either court do not determine the law of the case is not overlooked. . . .

"But the defendant also asserts that the Legislature has provided a method for the liquidation of the business, assets, and affairs of insurance companies by the defendant, to which all claimants must confine themselves, and that plaintiff has not done so. The statute in question does not assert that the method thus provided shall be exclusive, as do certain other statutes of the state. It is held on excellent authority that, where a remedy exists at common law and a remedial statute is directed at the same wrong, if such statute provides a larger or summary or more efficient remedy for the party aggrieved, but does not in terms or by necessary implication deprive the party injured of the remedy which existed at common law, the statutory remedy is considered as merely cumulative and the party injured may resort to either at his election. . . .

. . . . . .

"Even if the statute had in so many words expressed the intent to supersede the existing equitable and common-law

> rights, and to provide an exclusive method, it may well be doubted whether it would have any force or effect as to this plaintiff, a resident of Massachusetts, who is not subject to the jurisdiction of the laws of the State of New York as to his equitable or common-law rights, and has not sought the aid of the state courts. If the state of New York may, by legislative act, change the rights or remedies of a citizen of Massachusetts, it may change the rights or remedies of citizens of any other state and of all the states, and its power would, to the extent of rights arising from property existing in or illegally transferred to the state of New York, be equal to that of Congress. Such contention could not be maintained. In case of diversity of citizenship, one who elects to assert his equitable or common-law rights in a federal court cannot be deprived of them by the statutes of the state in which the federal court happens to exercise jurisdiction at the time. Morrill *v.* American Reserve Bond Co. (C. C.) 151 Fed. 305; Chicot County *v.* Sherwood, 148 U. S. 529, 13 S. Ct. 695, 37 L. Ed. 546. A federal court may not abdicate its duty or authority in any case in favor of another jurisdiction. Kline *v.* Burke Construction Co., 260 U. S. 226, 234, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077."

A similar case held that the Commissioner of Banking of Massachusetts, even though he took possession of a bank under the state statutes, is not such an official that the Federal Court cannot receive a suit from a non-resident plaintiff against him to establish a trust *ex maleficio* in connection with the funds in his hands: *Allen, Bank Commissioner* v. *U. S., 285 Fed. 678 (1923).*

In *Johnson* v. *Manhattan Ry. Co., 289 U. S. 479 (1933),* federal receivership of the street railway system of New York City, based on diversity of citizenship was sustained.

Authority is not wanting to illustrate the vitality of federal equity jurisdiction in suits against building and loan associations. The Opinion of Judge Welsh has set forth an imposing list of cases in which Federal Courts have appointed receivers for building and loan associations (R. 49-51).

Two decisions in the Circuit Court of Appeals for the Third Circuit long since established that federal jurisdictional authority was not to yield because of the character of the defendant.

In *Lyon* v. *McKeefrey*, *171 Fed. 381 (1909)*, diversity of citizenship was invoked by a resident of Ohio who filed a bill in the Federal Court for the appointment of receivers of a banking corporation organized under the laws of Pennsylvania. It was there pointed out that the Commonwealth of Pennsylvania, even under its own laws, had no exclusive jurisdiction over banking institutions.

In *O'Neil* v. *Welch*, *215 Fed. 201 (1917)*, the corporation involved was an insurance company chartered under the laws of Pennsylvania. There the district court upheld its jurisdiction to appoint receivers of such a quasi public corporation (*Welch* v. *Union Casualty Ins. Co.*, *238 Fed. 908 (1917)*), and the Circuit Court of Appeals, although deciding the case exclusively upon the question of priority in jurisdiction between the federal and the state Courts, uttered no disapproval of that view.

Not only is petitioner's argument contrary to the long standing decisions of the Federal Courts, but it is even at variance with the adjudication of the Supreme Court of Pennsylvania.

In *Jones* v. *Lincoln Savings & Trust Co.*, *222 Pa. 325, 71 A. 200 (1908)*, to which petitioner makes no reference, the court of Common Pleas of Philadelphia County appointed a receiver of a trust company upon a bill filed by a number of shareholders. Thereafter, at the instance of the Attorney General upon bill for dissolution under the former Act of February 11, 1895, P. L. 4, a receiver was appointed in the Dauphin County Court. The Attorney General sought to have this receiver supersede the Philadelphia receiver appointed on the stockholders' bill. The refusal of his prayer was affirmed by the Supreme Court of Pennsylvania. It probably was in consequence of this case that the Act of April 23, 1909, P. L. 167,

was passed providing that the appointment of a receiver "by any Court of this Commonwealth" should be cause for the superseding of that receiver on application by the Attorney General.

Finally, in *Mitchell* v. *Maurer*, 69 F. (2d) 233 (1934), a Federal receivership of a state insurance company was sustained notwithstanding the effort of the State Insurance Commissioner of California to be placed in possession of the business of the insurance company for the purposes of liquidation under the laws of that State. This court granted a writ of certiorari (*Mitchell* v. *Maurer*, 293 U. S. —— (1934)), but limited its review to the question of the validity of the appointment of ancillary receivers upon the petition of the primary receivers. In conformity with the decision in *McCandless* v. *Furland*, 293 U. S. —— (1934), the decision of the Circuit Court of Appeals in the Mitchell Case was reversed (293 U. S. —— (1934)). Nevertheless, we understand the limitation in the scope of the review granted by this Court to indicate that were it not for the lack of diversity of citizenship arising from the fact that the petition for ancillary receivers was filed by the primary receivers, the action of the Circuit Court of Appeals in the Mitchell Case would have been proper.

(d) *The Contract of subscription does not impair Federal jurisdiction.*

There remains for consideration the contention that the statutes of Pennsylvania relating to the supervision by the Secretary of Banking of institutions such as building and loan associations, form a comprehensive system of supervision and regulation which shareholders, by their subscriptions to stock in Pennsylvania corporations, agree to recognize. It is argued that in consequence of this alleged contract, the jurisdiction of Federal Courts is in all such cases wholly lost.

Petitioner refers to *McGarry* v. *Lentz*, 13 F. (2d) 51 (1926); *Cook* v. *Illinois Bankers' Life Assn.*, 46 F. (2d) 782

(1931); and *Haynes v. Fraternal Aid Union*, 31 F. (2d) 305 (1929), as laying down the rule that the contract of subscription between a shareholder and a corporation impliedly includes all provisions of the laws of the state of incorporation of his company. It is argued that in consequence of this rule Edwin B. Elson, who filed the bill for receivers in the present case, is bound by the laws of Pennsylvania relating to the supervision of building and loan associations by the Secretary of Banking and that these laws forbid him from invoking the jurisdiction of the Federal Court.

We need not dispute the entire line of argument which petitioner presses on this point, except that it is evident that the statutes to which petitioner refers have no such effect. If we assume that Mr. Elson became bound by the laws of Pennsylvania when he subscribed to his shares of stock in the Mortgage Building and Loan Association, an examination of the Banking Act of 1923 reveals, however, that the statute by which he was bound did not forbid him from invoking the jurisdiction of the Federal Court.

The law in force when the present proceeding arose was the Banking Act of 1923 (Act of June 15, 1923, P. L. 809, printed in full as an appendix to petitioner's Brief). In a number of instances petitioner's Brief ignores the plain provisions of that statute and states that a state Court is without authority to appoint receivers (See petitioner's Brief, pp. 10, 13, 14, 20, 31, 42). *This is not so.* The Courts of Pennsylvania had complete power to make unrestricted choice of receivers; the only limitation thereon was the subsequent one that the Secretary of Banking might, on account of the appointment of a receiver or for any other of many causes mentioned in the statute, take possession of an association, and upon so doing *supersede the receiver appointed by the state Court.* The provisions of the Banking Act of 1923 upon this subject follow:

> "The Secretary may . . . take possession of the business and property of any corporation or person subject to the supervision of the department, whenever it shall appear to him that such corporation or person:
>
> . . . . . .
>
> "IX. Is in the hands of a receiver appointed by any court, or in any bankruptcy proceeding, or of an assignee or trustee for creditors appointed by such corporation or person."

Section 22 provides for the taking of possession of the property of the corporation by the Secretary of Banking and the filing of a certified copy of a certificate of possession. It then proceeds:

> "From and after the filing of such certified copy in the office of the prothonotary, the secretary shall supersede any receiver, previously appointed by any court for, or any assignee or trustee for creditors appointed by, such corporation or person."

It is upon this very provision of subsection IX of Section 21 that petitioner bases its present petition (Paragraph 24, R. 26). It therefore argues that the appointment of receivers by the Federal Court was ground for the taking of possession and that the filing of a certificate of possession by the Secretary of Banking thereafter, because of such receivership, in law constitutes him a superseding receiver and therefore terminates the federal receivership. This whole argument, however, loses sight of the provision of Section 2 of the Act of 1923, which defines "Court" as:

> "The court of Common Pleas of the County where the banking house or other place of business of the corporation or person in question is located."

Accordingly, petitioner is not aided by the argument that Mr. Elson, in subscribing to the stock of the Mortgage Building and Loan Association, became bound by the laws of Penn-

sylvania. Those laws, we have seen, do not forbid him from invoking the jurisdiction of the Federal Court; they merely provide that if he or anyone else invoked the jurisdiction of the state court the Secretary of Banking *might, although he was not required to do so* by a certificate of possession, supersede such a receiver.

In short, the contract which petitioner argues Mr. Edson bound himself to by his stock subscription, did not bind him to refrain from seeking redress in either the federal or state Courts. The most it did was to make him subject to the state law by which a state receiver might be superseded by the Secretary of Banking in the discretion of that official. This distinction is clearly revealed in the cases cited by the petitioner. Thus in *Mercantile v. Lantz*, 13 F. (2d) 51 (D.C.) and in *Cook v. Liberty Bank, etc.*, Iowa, 50 F. (2d) 787 (1931), the state statute forbade application for receivership by anyone other than the Attorney General. The contract which the shareholder made, therefore, at most was a bartering away of his right to resort to other federal or state Courts for receivership.

On the other hand, in *Haynes v. Fraternal Aid Union*, 34 F. (2d) 455 (C.C.A.), also cited by petitioner, members of a fraternal insurance society filed a bill praying for the appointment of a receiver and for an accounting by certain officers who were alleged to have been guilty of misapplication of funds. The state statute prohibited receivership except on application of the Attorney General. The Court held that the shareholder was bound by this provision of the state law as a result of his contract of subscription, and that hence the prayer for receivership would be denied. *Nevertheless, the bill was sustained as to the prayer for accounting.* The Court said:

> "The state statute does not in terms provide for such an account [bill for accounting] against the officers by the Attorney General. It may be, by implication, he has such power. But there is no prohibition of the policy

holder maintaining such suit, and in the absence of such prohibition the statutory remedy is but cumulative (Citing authorities)."

The Pennsylvania statute makes no express provision with reference to resort to the *Federal Courts*. Even more, the state statute does not forbid resort to the state Court. It merely provides that the Secretary of Banking may, at his discretion, supersede a receiver appointed by a state Court. The effect of this is that no contract by Mr. Elson has any application to the present question. The present proceeding by the petitioner is not directed against Mr. Elson; his activity was terminated when the receivers were appointed. The petition is directed against the receivers who are the arm of the Federal Court. *They made no contract with the corporation and they are bound by none.*

It may therefore be concluded that the contract made by Mr. Elson with the association does not apply to a Federal Court, but merely to a state Court, and even then, does not forbid the institution of a suit for the appointment of receivers. The shareholder being permitted to secure the appointment of receivers in the Federal Court, he cannot by any contract determine the rights of the receivers so lawfully appointed.

There runs through petitioner's Brief the recurring error that no receiver may be appointed by a state Court. We have already pointed out that the only effect of the state law is to authorize the Secretary in his discretion to supersede a state receiver. That he need not do so is plain from the terms of the statute. And the practice under the statute indicates more conclusively than any argument what is the law and the policy pursued under it.

We may refer to at least one case in Pennsylvania, in Philadelphia County, in which, at the suit of a shareholder, receivers were appointed of a Pennsylvania building and loan association, likewise under the supervision of the Secretary of

Banking. Although the receiver was appointed more than two years ago, the Secretary of Banking has never filed a certificate of possession nor sought to supersede the state receiver. The state receiver is still in possession, liquidating the association, and has filed at least one partial account. The case we refer to is *Lindstrom v. U. S. National Building and Loan Association* (C. P. No. 1, Philadelphia County, June Term 1932, No. 8771, unreported).

Fresh evidence of the error of petitioner in this regard appears from the fact that the recent codification of the law, which of course is not applicable here, was drafted by the office of the Attorney General and clearly recognized that under the Banking Act of 1923 even the state Courts had the right to appoint receivers other than the Secretary of Banking.

The new law (Department of Banking Code of May 15, 1933, P. L. 565, Section 606), provides:

> "No Court shall appoint anyone but the Secretary [of Banking] as receiver of an institution. Whenever any court . . . shall determine that a receiver should be appointed . . . it shall appoint the Secretary as such receiver."

Even in this statute, "Court" is also defined as:

> "The Court of Common Pleas of the County in which the corporation or person has its principal or only place of business in this Commonwealth . . . " (Department of Banking Code, Section 2 A).

POINT II.

There was No Abuse of Discretion in the Appointment of Receivers.

(a) *The Secretary of Banking was not Exercising Jurisdiction over the Association.*

The main argument of petitioner is that the District Court abused its discretion in appointing the receivers and that this

abuse of discretion was so gross as to call for reversal upon appeal.

In order to measure the propriety of the action of the District Court, it is well to recall the circumstances under which it acted.

The Association was governed by the Banking Act of June 15, 1923, P. L. 809 (7 PS., Sections 1, *et seq.*). The present Department of Banking Code, approved May 15, 1933 (P. L. 565) and effective July 3, 1933, is a codification, restatement and alteration of the law. It was not in force, however, when the present proceedings were taken and hence is inapplicable here. An examination of the statutory law clearly reveals that prior to the Department of Banking Code of 1933 the method prescribed was loose and incomplete; and doubtless the Code and its companion Building and Loan Code of May 5, 1933 (P. L. 457), were enacted as a result of the deficiencies in the prior statutes.

How inadequate was the supposed system provided by the state law to which Petitioner refers is illustrated in a decision by the Supreme Court of Pennsylvania. In *Malis v. Homer Bldg. & Loan Assn., 314 Pa. 321, 171 A. 570, (1934)*, it was decided that prior to the Building and Loan Code of 1933 there was no legal foundation for voluntary liquidation of building and loan associations, and that accordingly a creditor was entitled to seize in execution any property of the association, despite the election of liquidating trustees. And it may be here observed that the almost universal practice of the Secretary of Banking in Philadelphia County has been not only to permit but to encourage the liquidation of associations through liquidating trustees.

An important reason for this practice on the part of the Secretary of Banking has been judicially noticed in another decision of the Supreme Court of Pennsylvania, which is not without significance here. In *Stone v. Schiller Bldg. & Loan Assn., 302 Pa. 544, 153 A. 758 (1931)*, an association with

a capital of $1,000,000 was liquidated by liquidating trustees, as the Opinion shows (p. 549), at the direction of the Secretary of Banking. Mr. Justice Kephart explained why this large association was not liquidated by the Secretary of Banking and why at his direction it was carried out in a manner which the subsequent opinion of the Supreme Court in the Malis Case showed was without legal authority. He said (p. 557):

> "The liquidation was ordered because, when done through statutory proceedings [by the Secretary of Banking], *there is too much waste to the shareholders.*"

Petitioner is driven to the anomalous argument that under the statute of Pennsylvania to which it points, the Secretary of Banking could have taken possession of the association as early as June 5, 1931, and yet failed to do so until the futile effort made after the appointment of receivers by the Federal Court. At the same time it argues that this inactivity and non-exercise of statutory power constitutes an exercise of "complete dominion over the affairs of Mortgage Building and Loan Association at the time complainant's bill was filed" (Petitioner's Brief, p. 38). From its own petition it appears that the Secretary of Banking did nothing until October 28, 1932, fifteen months later, when he requested a financial report, and on December 6, 1932, advised the officers of the Association that it was insolvent. This was all he did other than to suggest a method of operation, to select new counsel and a real estate advisor and to have the directors approve the various actions which he suggested. (Petition, pars. 10-12; R. 22).

He never exercised any authority or dominion over the association, never received one of its papers or documents into his possession or put them under his control, but permitted it to function as any other corporation in Pennsyl-

vania and as if it were a solvent association, leaving control entirely in the hands of its officers and directors.

As is well said by the Circuit Judge:

> "The association continued to go along and conduct business on this unstricted basis while insolvent or in an unsafe and unsound condition from June 5, 1931, until the Bill in this case was filed, February 9, 1933, when it was admittedly insolvent, with the interests of all persons who dealt with it or who were connected with it, in jeopardy" (R. 111).

What the Secretary should have done, and what alone would have constituted "full jurisdiction" over the liquidation of the association, was to take possession both because its condition was unsafe and unsound and because it was insolvent.

Much emphasis is placed upon the suggestions, letters or so-called orders from the Secretary of Banking. As shown by the District Judge, they constitute "mere admonitions" and do not "rise to the dignity of a restraining order" (R. 53). In fact they have no legal force except that their compliance may create an attitude of good-will, causing the Secretary of Banking to refrain from the exercise of his legal powers. This principle has been recognized in Pennsylvania. In *Blattenberger v. Sharswood Bldg. & Loan Assn., 19 Pa. D. & C. 447 (1933)*, the Department of Banking notified the association as to the manner in which it should conduct its business and placed it under "temporary restrictions," under which, *inter alia*, it was to pay no withdrawals and declare no maturities. The court held these letters merely directory and not binding, saying:

> "Section 20 of The Banking Act of June 15, 1923, P. L. 809, provided that 'Whenever it shall appear to the secretary that any corporation . . . is conducting business in an . . . unsafe manner, or that any such corporation has an impairment of capital, the secretary may issue an order, under his hand and seal of office, directing such corporation . . . to discontinue . . . such unauthorized or unsafe practices, or directing such corpo-

ration to make good, within a time of not more than sixty days after notice by the secretary, any impairment or deficiency of capital.' The letters from the secretary above referred to were not under his 'seal of office.' Indeed, they were not signed by him but by the assistant supervisor. They were not orders but merely requests. The defendant was not directed 'to make good . . . any impairment or deficiency of capital.' True, that of April 8, 1933, states that 'within sixty days you are to submit to this office a plan for rehabilitation of your affairs,' but submitting such a plan is not making good an 'impairment or deficiency of capital.' The letters referred to no 'unauthorized or unsafe practices,' but to the regular and proper acts of a building and loan association in the conduct of its business. Upon these the secretary was attempting to place 'temporary restrictions.' Under section 808 of the Building and Loan Code of May 5, 1933, P. L. 457, he now may do so by issuing an 'order of segregation,' but no such authority was vested in him prior to July 3, 1933, when that act became effective. It is therefore apparent that *the letters had no legal significance*, and that defendant should have credited plaintiff's payments on account of his shares of stock to the cancellation of his loan."

The letters in this case are similar in form and were equally unauthorized in law.

Had the Secretary been exercising full jurisdiction over the association, there would have been no power in the Nice Ball Bearing Company to proceed with execution (Banking Act of 1923, Secs. 29, 30, 7 PS.) and there accordingly would have been no need for the filing of the present Bill. It may be, as petitioner argues (Brief, p. 22), that "there is no charge in the bill of complaint that the Secretary of Banking . . . was guilty of neglect or delay in performing his duty." The answer to this assertion, however, is that the admitted facts proclaim his neglect. The Secretary's own petition reveals inactivity over a long period of time, rendering possible the consummation of the threatened attachment by Nice Ball Bearing Company and an unwilling-

ness to meet this threat which was only frustrated by the filing of the present Bill.

(b) *The District Court was Compelled to Exercise its Jurisdiction to Appoint Receivers.*

The circumstances already recited make it evident that it would rather have been an abuse of discretion if the District Judge had refused to appoint receivers. Under the unusual circumstances present in this case, the assertion that it was an abuse of discretion to appoint receivers is so extreme that to accept it as sound would be in effect to hold that there is no jurisdiction in any case to appoint receivers. It may therefore be understood why petitioner's argument on discretion is so indistinct from its argument on power. No stronger appeal to the discretion of a Court could be made than that presented by the plaintiff in this case. He appealed to the District Court under the Federal Constitution to extend to him as a citizen of New York its power of supervising and liquidating a Pennsylvania corporation through the instrumentality of a receivership in order to save the corporation in which he had a large financial interest from imminent destruction which the State authorities had long indicated they would not act to prevent.

Without further discussion, we submit that it is clear that petitioner cannot carry the heavy burden of showing a clear abuse of discretion, yet such is the burden upon it. In *Milwaukee and Minnesota Railroad Co.* v. *Howard, 131 U. S. Appdx. lxxxl (1866)*, this Court said:

> "The removal or appointment of a receiver, as we have heretofore said, rests in the sound discretion of the Court *and is not reviewable here.*"

In *Kingsport Press, Inc.* v. *Brief English Systems, Inc., 54 F. (2d) 497 (1931)*, (certiorari denied, *Owen* v. *Kingsport Press, 286 U. S. 545 (1932)*), the facts were so similar to those in the present case, that we set them forth at some length. The United States District Court for the Southern District of

New York appointed an equity receiver of the defendant. Thereupon a creditor of the defendant, who prior to the receivership had obtained a judgment and had allowed an appeal to be taken without the entry of security on the assurance of the defendant's then counsel that it was solvent, presented a petition to vacate the appointment of the receiver. The petitioner objected that the plaintiff's claim had not been reduced to judgment, that the suit was collusive and that its sole purpose was to prevent execution by petitioner.

On appeal Augustus N. Hand, of the Circuit Court of Appeals for the Second Circuit, after considering *Harkins* v. *Brundage*, *276 U. S. 36 (1928)*, cited by appellant as requiring the plaintiff to be a judgment creditor, said (pp. 500-1):

> "In most cases the estate can and should properly be administered in bankruptcy . . . In other words, we assume that the above dictum [in the Harkins Case] did not mean to proscribe the appointment of a receiver in equity for a railroad (which would not be subject to the Bankruptcy Act (11 U. S. C. A.)) or even for an industrial corporation, where it was made to appear that the corporation was likely to pay its creditors in full and to preserve its business through administration by a receiver, whereas the interests of general creditors would be greatly injured or destroyed if a single creditor were allowed to proceed with execution . . . Nor was the complainant here a mere dummy acting without risk of expense. On the contrary, it acted on its own behalf and through its regular attorneys and was vitally interested in not having the assets seized on execution by a judgment creditor who would get his claim paid in full while other creditors might have to go begging. In such circumstances, there can be no reason for holding that the judge abused his discretion in appointing a receiver or that the complainant was guilty of any fraud upon the judgment creditor, Owen, or upon the court. The judge, on the facts presented, adopted the only course that seemed to give the creditors of the defendant a chance to be paid in full or, even if they should not be paid in full, to be

treated equally . . . We should not interfere with the exercise of that discretion in the absence of proof of abuse. Sage *v.* Memphis, etc., Railroad Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. Ed. 694; Folk *v.* United States (C. C. A.) 233 F. 177; Ward *v.* Central Trust Co. of Illinois (C. C. A. 252 F. 127; City Bond & Finance, Inc. *v.* Grant, (C. C. A.) 30 F. (2d) 671.

. . . . . .

"The contention that the appointment was obtained by collusion is based on a confusion of ideas. It seems to be thought that it was illegal for the defendant to inform the complainant that Owen was ready to issue execution or to take any steps that would facilitate a receivership. We can discover nothing illegal in this. Owen had no vested right to prevent other creditors from being paid if an administration of the property of the defendant through an equity receivership would produce such a result though after some inconvenience and delay to himself."

In *First National Bank of San Francisco v. Detroit Trust Co., 248 Fed. 10 (1918)*, it was said:

"It is to be observed that an appellate court will not reverse such an order as that which is here appealed from [the appointment of a receiver with authority to continue the business] unless it appears that the discretionary power of the court 'has been so improvidently and improperly exercised as to bring its action clearly within the meaning of the term "abuse of power."' Heinze *v.* Butte & Boston Consolidated Min. Co., 126 Fed. 1, 11, 61 C. C. A. 63, 73; United States Shipbuilding Co. *v.* Conklin, 126 Fed. 132, 60 C. C. A. 680; Briggs *v.* Neal, 120 Fed. 224, 56 C. C. A. 572."

This is the law in Pennsylvania.

In *Franklin National Bank v. Kennerly Coal & Coke Co., 300 Pa. 479, 150 A. 902 (1930)*, the Court states:

"The appointment of a receiver is a discretionary matter with the court below, and its action will not be disturbed unless there is a clear abuse of sound judicial discretion."

As a matter of law, such an appointment was not appealable in the Federal Courts until the passage of the Act of April 14, 1906, 34 Stat. at L. 116 (now contained in Sec. 129 of the Judicial Code, 28 U. S. C. A. 227). See *Loveland's Appellate Federal Jurisdiction, Secs. 187, 193.*

Not only does petitioner carry a heavy burden in seeking upon appeal to convict the Court below of an abuse of discretion, but it carries the additional burden of showing that the appellate Court itself, which sustained the Court below, likewise was guilty of an abuse of discretion. We submit that petitioner's case falls far short of meeting this twice heavy burden.

A number of authorities have been cited with respect to the exercise of discretion. Petitioner seems to place great reliance upon *Port Newark National Bank of Newark* v. *Waldron*, 46 F. (2d) 296 (1930). The Opinion in that case was written by Judge Buffington, who likewise sat in the present case and joined in the decision which petitioner here attacks. That case does not involve the exercise of discretion by a Federal Court where the rights or duties of state officials are involved. Rather does it concern the appointment of receivers of a *national bank* by a Federal Court where the federal Comptroller of the Currency has appointed a receiver. As was said by Judge Buffington:

> "This is not a conflict of two courts of coordinate jurisdiction, but is one between the judicial and the executive arm of the [same] sovereignty."

It is of little avail, however, to argue at length that in a case of such inactivity on the part of the state official and such pressing danger threatened by a judgment shareholder, the exercise of conceded jurisdiction was so arbitrary, that having escaped condemnation upon appeal, this Court should now interfere.

POINT III.

Conclusion.

It is argued by petitioner that the decision of the Circuit Court of Appeals in effect assists a building and loan association to escape the jurisdiction and laws of the state creating it. This argument comes far too late for it has found organic expression in the Constitution of the United States in cases of diversity of citizenship (Art. III, Sec. 2). Nowhere in the Record can be found a single fact which supports the argument that to permit liquidation of a building and loan association under the jurisdiction of a federal Court will result in the destruction of its assets and the ruin of its shareholders. The language of the Supreme Court of Pennsylvania in the Stone Case, which we have already quoted, eloquently answers this argument. Surely it would be a novel thing for this Court to judicially notice as true an argument which on its face must prove unsound and a reflection upon the Federal Courts. The petitioner, however, should have descended from such a generality to this particular case. The conduct of the state officials can in no way be justified and that unjustifiable conduct alone made necessary and possible the appointment of federal receivers. The proper method of avoiding federal receivership of a building and loan association is not to destroy a constitutional jurisdiction but for state officials to execute the laws. If, under the laws existing when these proceedings arose, the Secretary of Banking had taken possession of unsafe and unsound or insolvent associations there could be no federal receivership. If his neglect of the power conferred upon him has resulted in administration through some other agency, he cannot complain.

The entire fallacy of petitioner's argument rests in its failure to recognize that under the Act of 1923 and similar legislation, the Secretary's power of supervision was not an exercise of possession or jurisdiction over building and loan

associations. It is quite probable that the Building and Loan Code of 1933, which provides for Orders of Segregation (Section 808) is legislative recognition of the prior error entertained by the Department of Banking. Under the new law the Secretary of Banking is given intermediate jurisdiction over associations, even short of the taking of possession. His orders in such cases may not be, as heretofore, mere words of advice which in practice an insolvent association would feel impelled to follow but which a sound and solvent association might legally defy. If this be true, then such intermediate orders, made in the future, may prevent federal receivership in all such cases because the *res* will have been already in the possession of the state.

But it is well that non-residents should know that the jurisdiction of Federal Courts is still available to them. To use the illustration of a bank or trust company, which petitioner seems to believe is so conclusive in its favor, is there any public policy which should destroy the jurisdiction of Federal Courts in a case where the state agency negligently refuses to take possession of a bank or trust company which for almost two years has been insolvent? If the state authorities should for any reason be unwilling for two years to close the doors of an insolvent bank, it is well that Federal Courts have the power to intervene and do so themselves.

The plaintiff in this case is admittedly a non-resident and had invested $31,200. in the association which the state agencies did not properly protect. Vigilance, activity and performance of duty by the Secretary of Banking would have rendered a federal receivership unnecessary. Had he taken possession it would have rendered unnecessary the exercise of constraint upon the association in the choice of its solicitors and real estate agents by the threat of possession.

We may also call attention to Equity Rule 37 which provides:

> "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

This rule has been interpreted in many cases unfavorably to petitioner here. Among these cases may be mentioned *Board of Drainage Com'rs.* v. *Lafayette South Side Bank of St. Louis, 27 F. (2d) 286 (1928).*

It is submitted that this case involves, not high questions of public policy, but a very common illustration of an attempt to alter well established law to justify administrative inactivity and neglect.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 394.—October Term, 1934.

Commonwealth of Pennsylvania, Petitioner, *vs.* John G. Williams, Joseph B. Simon, and Charles Denby, Jr., Receivers of Mortgage Building and Loan Association.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 4, 1935.]

Mr. Justice Stone delivered the opinion of the Court.

In this case certiorari was granted, — U. S. —, directed to the Court of Appeals for the Third Circuit, to resolve questions of public importance growing out of the rival claims of a federal district court and the Department of Banking of the Commonwealth of Pennsylvania; each asserts authority to liquidate the business and affairs of an insolvent building and loan association, organized under the laws of Pennsylvania.

On February 9, 1933, a New York shareholder in Mortgage Building and Loan Association, a Pennsylvania corporation, on behalf of himself and other shareholders filed a bill of complaint in the district court for eastern Pennsylvania, naming the Association as defendant, and alleging that it was the result of the merger of several building and loan associations, in one of which the plaintiff in the suit was a shareholder, and that he had refused to participate in the merger and had demanded of the Association cancellation and payment of his shares. The bill alleged the insolvency of the Association and a threatened race of diligence by its creditors to satisfy their claims from the assets of the corporation, and prayed the appointment of receivers for the corporation, the liquidation of its business and assets, and the usual injunction restraining creditors and others from interfering with or taking possession of its property. Thereupon, on the same day, and on the appearance of the defendant corporation, which interposed no objection, the district judge appointed temporary re-

ceivers. No notice of the application was given to the corporation's creditors or other shareholders, or to the Department of Banking of the Commonwealth. On the following day the corporation filed its answer, admitting the material allegations in the bill of complaint and joining in its prayer.

On that day the Secretary of Banking informally requested the district judge not to make the appointment of the receivers permanent and to allow the property of the defendant to be surrendered to the Secretary, to be liquidated and administered in accordance with the state statutes. On March 27, 1933, the Commonwealth filed its petition in the district court, asking leave to intervene in the pending equity proceeding and for an order directing the receivers to surrender the assets of the defendant association to the state Secretary of Banking. In addition to the matters already stated, the petition alleged the further facts, which are admitted or established: that the Association, organized as a building and loan association, is subject to the supervision of the State Department of Banking, as provided by the Banking Act of June 15, 1923, P. L. 809; that the statutes of the Commonwealth afford a complete, comprehensive and economical scheme for liquidation by the Secretary of Banking of such a building and loan association, when insolvent or in a financial unsound condition; that § 21 of the statute, providing that the Secretary, after notice and hearing, may, with the consent of the Attorney General, take possession of the business and property of a building and loan association when it appears to be in an "unsafe or unsound condition to continue business," specifically authorizes the Secretary to take possession of the property of the association when it is "in the hands of a receiver appointed by any court;" that upon taking such possession the Secretary is required, by § 22, to issue and file his certificate to that effect; that pursuant to the requirements of the statute, the Secretary, after the prescribed hearing, had found the defendant insolvent and in the hands of a receiver and that, with the consent of the Attorney General, he had on February 17, 1933, duly made and filed his certificate, "taking possession" of the property and appointing a special deputy as agent to assist in liquidating the defendant's business and property.

The district court denied the petition of the Commonwealth and later appointed the temporary receivers, with another, as perma-

nent receivers, who are respondents here. It treated the case as though it were one of the rival claims of a state and a federal court to jurisdiction over the same subject matter and property, see *Harkin* v. *Brundage*, 276 U. S. 36, and held that the jurisdiction of the district court had attached when the bill of complaint was filed and that it was the duty of the court, under the laws and the Constitution of the United States, to retain that jurisdiction and to proceed with the liquidation to the exclusion of the state authorities. 4 F. Sup. 779. The Court of Appeals for the Third Circuit affirmed upon like grounds. 72 F. (2d) 509.

The Attorney General of the Commonwealth argues here, as he did in both courts below: (a) that the federal court is without jurisdiction to direct the liquidation in a suit brought against the corporation by a shareholder, since both parties are subject to and bound by the local law, which provides for liquidation of a domestic corporation exclusively through the agency of a state supervisory officer; and (b) that, in any event, the court in its discretion should have refused the appointment of receivers or, having appointed them, it should have granted the petition of the Commonwealth and directed the receivers to surrender the property of the association to the state official.

1. The statutes of the United States, as incorporated in the Judicial Code, c. 231, § 24, 36 Stat. 1087, 1091; 28 U. S. C. § 41 (1), provide that district courts shall have original jurisdiction "of all suits of a civil nature, at common law or in equity, . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and . . . is between citizens of different states." We do not doubt that the allegations in the present bill of complaint are sufficient to establish the jurisdiction of the district court as a federal court; that is to say, it properly invokes the power and the authority, conferred upon the district court by the Constitution and statutes of the United States, to entertain the suit. The bill alleges diversity of citizenship and the requisite jurisdictional amount, both of which allegations stand unchallenged, see *Philadelphia, Wilmington & Baltimore R. Co.* v. *Quigley*, 21 How. 202, 214; *Deputron* v. *Young*, 134 U. S. 241, 251; *Healy* v. *Ratta*, 292 U. S. 263, 271, and prays relief which a federal court of equity is competent to give, see *Duignan* v. *United States*, 274 U. S. 195, 199.

Although, as will presently appear, the district judge in the exercise of his discretion might appropriately have given notice, to the officers of the Department of Banking, of the application for the appointment of receivers, such notice was not prerequisite to the exercise of its jurisdiction. See *Harkin* v. *Brundage, supra; Re Metropolitan Railway Receivership*, 208 U. S. 90; cf. *Marin* v. *Augedahl*, 247 U. S. 142.

The objection that the suit was brought by a shareholder of the insolvent corporation rather than by its judgment creditor, see *Burnrite Coal Briquette Co.* v. *Riggs*, 274 U. S. 208, as well as the opposing contention that under Pennsylvania law the present shareholder has the status of a creditor, see *Nice Ball Bearing Co.* v. *Mortgage Building & Loan Association*, 310 Pa. 560, need not now be considered. Even if valid it does not go to the jurisdiction of the district court as a federal court, but only to the propriety of its action as a court of equity. See *Smith* v. *McKay*, 161 U. S. 355, 358, 359; *Blythe* v. *Hinckley*, 173 U. S. 501, 507; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 500; *Twist* v. *Prairie Oil & Gas Co.*, 274 U. S. 684, 690. Unlike the objection that the court is without jurisdiction as a federal court, see *Mansfield Cold Water & Lake Michigan Ry. Co.* v. *Swan*, 111 U. S. 379, 382, the parties may waive their objections to the equity jurisdiction by consent, *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 380; *Re Metropolitan Railway Receivership, supra*, 109, 110, or by failure to take it seasonably, *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530, 535, 536; *Southern Pacific R. Co.* v. *United States (No. 1)*, 200 U. S. 341, 349. Even if the present objection be regarded as valid and as one which, in some circumstances, the court should take *sua sponte* at any stage of the proceedings, despite the waiver by the parties, compare *Harkin* v. *Brundage, supra*, 52; *Lewis* v. *Cocks*, 23 Wall. 466, 470, the district court was not without jurisdiction as a federal court, for these are questions which it is competent to decide. It was therefore invested with authority to hear and make disposition of the cause, which is not open to collateral attack, see *Bryan* v. *Kennett*, 113 U. S. 179, 198; *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 496, or subject to diminution or control by state statutes. See *United States* v. *Howland*, 4 Wheat. 108, 115; *Neves* v. *Scott*, 13 How. 268, 272; *Mississippi Mills* v. *Cohn*, 150 U. S. 202, 204-206; *Mason* v. *United States*, 260 U. S. 545, 557.

Error in the exercise of that jurisdiction can be remedied only by appeal. See *Smith* v. *McKay*, *supra*, 358, 359.

2. The question remains whether, in the special circumstances of the case, the district court rightly retained its jurisdiction. The relief prayed in the bill of complaint is equitable in its nature, and the prayer was addressed to the sound discretion which is the controlling guide of judicial action in every phase of a suit in equity. The relief sought, an injunction and the appointment of receivers, was aimed at the prevention of irreparable injury, from the waste of the assets of the insolvent corporation which would ensue from a race of creditors to secure payment of their claims by forced sale of the corporate property. By local statutes elaborate provision is made for accomplishing the same end, through the action of a state officer, in substantially the same manner and without substantially different results from those to be attained in receivership proceedings in the federal courts.[1] There is no alle-

[1]The Pennsylvania Banking Act of 1923, P. L. 809, as amended by the Acts of 1927, P. L. 762; 1931, P. L. 193, 563; 1932, P. L. 7, provides for the regulation and supervision of financial institutions, including building and loan associations. Section 21 authorizes the Secretary to take possession of the business and property of a building and loan association if its condition is "unsafe or unsound," or if the association has violated the law or an order of the Secretary; he can take possession only after notice and hearing and after securing the approval of the Attorney General. Section 22 requires the Secretary to file a certificate in his office and in that of the prothonotary of the court having jurisdiction (by § 19 the Court of Common Pleas of Dauphin County or of the county in which the corporation is located), stating that he has taken possession of the business and property of the association. The association may, under § 23, obtain court review of the action, by application within ten days for a show cause rule. The Secretary, after giving notice to all persons holding assets of the association (§ 25), and after taking an inventory of the assets (§ 26), may either suspend or continue the business pending determination of whether or not to liquidate the affairs of the association (§ 27). By § 28 the Secretary is authorized to surrender possession upon the resumption of business by the association or the sale of its assets to a successor or independent corporation. Although the authority of the Secretary is not derived from the action of any court, § 29 gives him, "except as herein otherwise provided," the status and powers of a receiver of a court of equity. The court having jurisdiction is given, by § 30, power to enforce orders of the Secretary. Under § 31 his possession continues until liquidation, resumption of business by the association, surrender under § 28, the substitution of liquidating trustees elected by shareholders or appointed by the court as provided in § 50, or payment of the creditors in full.

gation or contention that the procedure thus provided is inadequate, or that it will not be diligently and honestly followed. In such circumstances the discretion of the district court, invoked by the petition of the commonwealth, should have been exercised to relinquish the jurisdiction in favor of the statutory administration of the corporate assets by the state officer.

The question is not the ordinary one of comity between a federal and a state court, each asserting jurisdiction over the same subject matter, and the same property, and where there are shown no special reasons adressed to the discretion of the court first acquiring jurisdiction for relinquishing its jurisdiction in favor of the other. Compare *McLellan* v. *Carland*, 217 U. S. 268, 281, 282; *Hyde* v. *Stone*, 20 How. 170, 175; *Chicot County* v. *Sherwood*, 148 U. S. 529, 534; *In re Chetwod*, 165 U. S. 443, 460, with *Harkin* v. *Brundage, supra; Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123; *Kansas City Pipe Line Co.* v. *Fidelity Title & Trust Co.*, 217 Fed. 187 (C. C. A. 8th); *First National Bank of Memphis* v. *Horuff*, 65 F. (2d) 319 (C. C. A. 5th). Here no state court is asserting jurisdiction, but the state officer, charged by the statutes of the state with the duty of supervising its own building and loan associations and of liquidating them by an adequate procedure when insolvent, asks to proceed with the liquidation. See *Amos* v. *Trust Co. of Florida*, 54 F. (2d) 286, 288 (C. C. A. 5th).

The Secretary is authorized to compromise claims (§ 34) and to prosecute or defend suits (§ 35). During his possession, no lien shall attach or execution issue against the property of the corporation, and no pledgee shall, without permission of the Secretary or order of the court, sell the collateral or pledge (§ 36). Before liquidation, the Secretary must give notice to creditors and depositors (§ 41) and have an inventory and appraisement made by disinterested persons (§ 38). By § 45 the Secretary must submit a final or partial account of claims allowed or rejected, and any party in interest may file objections in the court; if no account is submitted within one year, a court order directing its submission may be obtained. Section 46 provides that the account is binding and conclusive, except as to those parts to which objection has been made in court, and directs distribution in accordance therewith. If the account were partial, its confirmation is not conclusive on claims specified in subsequent accounts (§ 47). The court is to hear and determine matters in controversy (§ 48). Expenses of administration are to be paid out of the association's funds and are subject to the approval of the court (§ 49). Section 50 provides for the election of liquidating trustees by the shareholders, or appointment by the court in default of election, if a balance remains after the final account has been filed and the creditors paid in full.

A court of equity, which in its discretion may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest, see *Greathouse* v. *Dern*, 289 U. S. 352, 359, 360, or deny relief upon performance of a condition which will safeguard the public interest and secure substantial justice to the complainant, see *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338, would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer. It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy. *Fenner* v. *Boykin*, 271 U. S. 240, 243, 244; *Massachusetts State Grange* v. *Benton*, 272 U. S. 525, 527; *Matthews* v. *Rodgers*, 284 U. S. 521, 525; cf. *Central Kentucky Natural Gas Co.* v. *Railroad Commission of Kentucky*, 290 U. S. 264, 273. It has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of the state courts, where its exercise would involve control of or interference with the internal affairs of a domestic corporation of the state. See *Rogers* v. *Guaranty Trust Company, supra*, 130, 131; compare *Burnrite Coal Briquette Co.* v. *Riggs, supra*, 212, 213; *Canada Malting Co., Ltd.* v. *Patterson Steamships, Ltd.*, 285 U. S. 413, 419-423; *Langnes* v. *Green*, 282 U. S. 531, 541. There are stronger reasons for adopting a like practice where the exercise of jurisdiction involves an unnecessary interference by injunction with the lawful action of state officers. *Matthews* v. *Rodgers, supra*, 525.

Here, upon presentation of the application for appointment of receivers, which would involve such an interference, the district judge might appropriately have required notice of the application to be given to the state officers. It was his duty to do so if satisfied that the delay involved in adopting that course would not result in the sacrifice of any vital interest of the insolvent corporation, its creditors or its stockholders. On the showing that their interests would be adequately protected by liquidation under the direction of the Secretary of Banking, the district judge should have denied the application for the appointment of receivers or, if he had already appointed them, should have discharged the receivers, and directed the surrender of the property in their possession to the Secretary in order that the liquidation might proceed under the state statutes.

That course should be pursued now. For that purpose the decree will be reversed and the cause remanded. The district court will direct that all assets and property in the possession of the receivers be, with all convenient speed, surrendered to the Secretary of Banking, the receivers retaining only sufficient of the assets of the defendant association to pay their reasonable fees and any obligations lawfully incurred by them. Jurisdiction will be retained by the district court only for that purpose and for the purpose of promptly discharging the receivers and settling their accounts, after which the suit will be dismissed. See *Harkin* v. *Brundage, supra,* 57, 58.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.